Justice Field

807.

SUPREME COURT OF THE UNITED STATES.

No. 253.

CALVIN BURR, PLAINTIFF IN ERROR,

vs.

DES MOINES NAVIGATION AND RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

GOVERNMENT PRINTING OFFICE.

(Patterson C. Co. v.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judge of the Circuit Court of the United States for the District of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court before you, between Calvin Burr and the Des Moines Navigation & Railroad Company, a manifest error hath happened to the great damage of the said Calvin Burr, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

2 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness: The honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

SAM'L F. MILLER,
Judge of the Circuit Court of the U. S., District of Iowa.

Issued by me, the clerk of the said circuit court, under its seal.

W. G. WOODWARD,
Clerk Circuit Court U. S.

3 *The United States of America to the Des Moines Navigation & Railroad Company, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the State of Iowa, wherein Calvin Burr is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness: The hon. Roger B. Taney, chief justice of the Supreme Court of the United States, on the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-two.

SAM. J. MILLER, *Judge.*

I admit due service of the above citation.

CHA'S MASON, *Att'y for d'f't.*

4 Know all men by these presents, that we, Calvin Burr, as principal, and John Browne, as surety, are held and firmly bound unto the Des Moines Navigation and Railroad Company in the full and just sum of one thousand dollars, to be paid to the said Des Moines Navigation & Railroad Company, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals, and dated this fifteenth day of May, in the year of our Lord one thousand eight hundred and sixty-two.

Whereas, lately at a circuit court of the United States for the State of Iowa, in a suit depending in said court between Calvin Burr, as plaintiff, and the Des Moines Navigation & Railroad Company, as defendants, judgment was rendered against the said Calvin Burr, and the said Calvin Burr having obtained a writ of error, and filed
5 a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Des Moines Navigation & Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next.

Now the condition of the above obligation is such, that if the said Calvin Burr shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and effect.

CALVIN BURR,
By FINCH, CLARK & RICE, *his Att'ys.*
J. BROWNE.

Approved May 16th, 1863.

SAM. F. MILLER, *Presiding Judge.*

The defendant in error consents to the sufficiency of the above bond and to its approval.

CHA'S MASON, *Att'y for Def't in Error.*

6 Circuit court of the United States for the district of Iowa.

CALVIN BURR *vs.* THE DES MOINES NAVIGATION AND RAILROAD COMPANY.	Petition.	May Term.

In the year one thousand eight hundred and sixty-three, district of Iowa, to wit:

The Des Moines Navigation & Railroad Company, being a corporation created by the State of Iowa, and organized and residing in, and being a citizen of the said State of Iowa, was summoned to answer Calvin Burr, being a citizen of the State of New York, of a plea of covenant; and thereupon the said Calvin Burr, plaintiff, by Finch, Clark & Rice, his attorneys, complains of the said The Des Moines Navigation & Railroad Company, defendants, for that, whereas heretofore, to wit, on the ninth day of November, 1858, to wit, at Des Moines, in said district, by a certain indenture then and there made between the said defendants, of one part, and the
7 said plaintiff, of the other part, which said indenture, sealed with the seal of said defendants, the plaintiff now brings into court here, the date whereof is the day and year aforesaid, it was witnessed that the said defendants, in consideration of the sum of ($9,592) nine thousand, five hundred and ninety-two dollars, to them in hand paid by the said plaintiff, did thereby grant and convey to the said plaintiff, the following tract of land in the State of Iowa, to wit, the southwest quarter (SW. ¼) and east half (E. ½) of section twenty-one (21), town 89, range 28—being (480) four hundred and eighty acres. And the said defendants, in and by the said indenture, then and there warranted the title of said lands against all persons whomsoever, and thereby covenant that the said defendants then had, and that the said plaintiff, by means of the said indenture, did and would receive and take a good and perfect title in fee to the said tract of land, as by the said indenture, reference being
8 thereto had, will more fully and at large appear; yet the said plaintiff in fact saith, that the said defendants then and there had no title whatsoever to the said tract of land, nor any part thereof, and the plaintiff did not then and there, nor at any time afterward, by means of the said indenture or otherwise, receive or take any title whatsoever to the said tract of land; but the said defendants, to fulfil their said warranty of the title to said lands, and to cause the said plaintiff to receive and take a good or perfect title in fee to the said tract of land, although often requested, etc., have hitherto wholly neglected and refused, and still do neglect and refuse; of all which the said defendants had notice; and so the said plaintiff in fact saith, that the said defendants, although often requested, etc., have not kept the said covenants so by them made as aforesaid, but have broken the same to the damage of the said plaintiff of fifteen thousand dollars; and thereof the said plaintiff brings his suit, etc.

FINCH, CLARK & RICE,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA,
District of Iowa.

9 In circuit court of U. S. for district of Iowa.

I hereby certify that the foregoing three pages are a true and correct copy of the petition (or declaration) of the plaintiff in the with-

in-named suit, as the same remains on file among the records of the above-named court.

[SEAL.] Witness my hand and the seal of the said circuit court, at Des Moines, this 16th day of May, A. D. 1863.

W. G. WOODWARD,
Clerk of Circuit Court of the United States, District of Iowa.

10 Circuit court of the United States for the district of Iowa.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY *ad sm.* CALVIN BURR. } Answer or plea.

And the said defendants by Charles Mason, their attorney, come and defend the wrong and injury when, &c., and as to the supposed breach of covenant above assigned and alleged by the said plaintiff, they, the said defendants, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them the said defendants, because they say they, the said defendants, before and at the time of the making of the said indenture in the said plaintiff's declation above mentioned, were seized in fee of the said tract of land, and did then and there by the said indenture convey to the said plaintiff a good and perfect title in fee to the same, and this the said defendants are ready to verify. Wherefore the said defendants pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, etc.

And for a further plea in this behalf, the said defendants
11 by leave of the court here first had and obtained according to the form of the statute in such case made and provided, say, that plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the said defendants, after the making of the said indenture in the said declaration mentioned, and before the commencement of this suit, to wit, on the first day of August, 1862, acquired and took a title and estate in fee in the said tract of land, which said last-mentioned title and estate by the common law of the said State of Iowa, and, also, by the statutes of the said State of Iowa, did forthwith enure to and rest in the said plaintiff as the grantee of the said defendants by the said indenture, and that by means of the premises the said plaintiff, before the commencement of this suit, did receive and take a good and perfect title in fee to the said tract of land, of all which the said plaintiff had notice, without this that the said plaintiff suffered any damages by means of anything in the said declaration mentioned. And this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid
12 action thereof against them, etc.

CHA'S MASON,
Att'y for Def't.

13 Circuit court of the United States for the district of Iowa.

CALVIN BURR
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY. } Replication.

And the said plaintiff, by his attorney, aforesaid, as to the said plea of the said defendants, by them first above pleaded, says that he, said plaintiff, ought not, by reason of anything in that plea alleged, to be barred from having or maintaining his aforesaid action, because he says that the said defendants, at the said time, when, etc., were not seized in fee of the said tract of land, nor did they convey to the said plaintiff any title thereto, in manner and form as in that plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, etc. And the said defendants likewise, etc.

And the said plaintiff, by his attorney aforesaid, as to the said plea of the said defendants, by them secondly above pleaded, says that he, the said plaintiff, ought not, by reason of anything in that plea
14 alleged, to be barred from having or maintaining his aforesaid action thereof, because he says that the said defendants did not, at the said time, when, etc., acquire or take any title or estate, nor did such supposed title or estate rest in the said plaintiff, nor did the plaintiff receive or take any title whatsoever in manner and form as in that plea alleged; and this the said plaintiff prays may be inquired of by the country, etc., and the said defendants likewise, etc.

FINCH, CLARK & RICE,
Plaintiff's Att'ys.

15 At a term of the circuit court of the United States in and for the district of Iowa, begun and holden at Des Moines, Iowa, on the 12th day of May, A. D. 1863, the following, among other proceedings, were had.

THURSDAY, *May* 14*th*, A. D. 1863.

CALVIN BURR
v.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY.

Now this day, this cause coming on for hearing, the plaintiff appears by D. O. Finch, esq., his attorney, and the defendants by Charles Mason, esq., their attorney, and a jury being waived the cause is submitted to the court.

And the evidence being introduced, and the arguments of counsel being heard, the court takes time to consider the same; and afterwards it is ordered that the following judgment be entered
16 herein :

16 The evidence having been seen and examined by the court, and the arguments of counsel heard, it is now considered and adjudged that the court do find the issue in favor of the defendant, and that the plaintiff take nothing by his petition.

Whereupon it is ordered that the defendant recover of the plaintiff his costs in this behalf expended, taxed at $9 55, and that he have execution therefor.

17 UNITED STATES OF AMERICA,
District of Iowa:

I, W. G. Woodward, clerk of the circuit court of the United States in and for the district of Iowa, hereby certify that the foregoing eight pages and part pages of writing contain a true, full, and perfect copy of the plaintiff's petition and replication of the defendant's answer, and of all the proceedings of the court in the abovenamed cause.

In testimony whereof, I hereunto set my hand and affix the seal of the said circuit court, this 16th day of May, A. D. 1863.
[SEAL.]

W. G. WOODWARD,
Clerk of the Circuit Court of U. S. Dist. of Iowa.

18 In the circuit court of the United States for the State of Iowa.

CALVIN BURR
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY.

The plaintiff is a citizen of the State of New York, now residing in said State. He purchased of the defendants the lands mentioned in the declaration in this action, which lands were conveyed to the plaintiff for the consideration of $9,592, by the defendants by deed in fee simple, on the ninth day of November, 1858. In and by said deed of conveyance the defendants covenanted as to the title to said lands, and warranted said title against all persons whomsoever.

The lands are worth more than the sum of two thousand dollars. If, under all the circumstances of the case, as herein stated, the defendants had a good title to said lands at the time of the date of said conveyance, or if the title of the defendants to said lands was defective at that date, but has been made good by any subsequent resolution or act of Congress, or in any other manner, prior to the commencement of this suit, in such case the defendants will be entitled to judgment in this suit; but if, under all the circumstances of the case, the said title was not good at the date of said conveyance, and has not been made good by any matter subsequent thereto, then the plaintiff is entitled to judgment in this suit for the sum of $9,592, and interest from the date of said conveyance.

The defendants are a corporation existing under the laws of Iowa, and claim to have obtained a good title under sundry acts of Congress, and of the executive departments of the general government, and of the State of Iowa, as herein stated.

On the 8th August, 1846, the Congress of the United States passed an act, of which the following is a copy:

"An act granting certain lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river in said territory.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is, granted to said Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines river from its mouth to the Raccoon fork (so called,) in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold, and not otherwise disposed of, incumbered, or appropriated,) in a strip five miles in width on each side of said river, to be selected within said Territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States.

"SECTION 2. *And be it further enacted*, That the lands hereby granted shall not be conveyed or disposed of by said Territory, nor by any State to be formed out of the same, except as said improvements shall progress; that is, the said Territory or State may sell so much of said lands as shall produce the sum of thirty thousand dollars, and then the sales shall cease until the governor of said Territory or State shall certify the fact to the President of the United States that one half of said sum has been expended upon said improvements, when the said Territory or State may sell and convey a quantity of the residue of said lands sufficient to replace the amount expended; and thus the sales shall progress as the proceeds thereof shall be expended, and the fact of such expenditure shall be certified as aforesaid.

"SECTION 3. *And be it further enacted*, That the said river Des Moines shall be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever, for any property of the United States or person in their service passing through or along the same: *Provided always*, That it shall not be competent for the said Territory or future State of Iowa to dispose of said lands, or any of them, at a price lower than, for the time being, shall be the minimum price of other public lands.

"SECTION 4. *And be it further enacted*, That whenever the Territory of Iowa shall be admitted into the Union as a State, the lands hereby granted for the above purpose shall be and become the property of said State for the purpose contemplated in this act, and for no other; *Provided*, The legislature of the State of Iowa shall accept the said grant for the said purpose.

"Approved August 8th, 1846."

The said grant was fully accepted by the State of Iowa for the purpose contemplated in said act, and everything was done on the part of the State necessary to perfect its title under the act.

19 Agents were afterwards duly appointed by the governor of

the State, who selected the sections designated by "odd numbers" throughout the whole extent of the grant. The selections thus made embraced all of the sections of the public lands designated by odd numbers (then remaining unsold, and not otherwise disposed of, incumbered, or appropriated,) lying and being in said Territory or State of Iowa, within a strip of five miles in width on each side of said river Des Moines, from its mouth to its source, at or above the northern boundary of the State. The selection "by odd numbers" was approved by the Secretary of the Treasury of the United States.

The lands mentioned in the declaration in this suit are a part of the lands thus selected and approved. They are within the limits of what was the Territory of Iowa on the 8th day of August, 1846, and are within five miles of the Des Moines river, but they are situated above the Raccoon Fork of said river, and are not between said Raccoon Fork and the mouth of said river.

On the 24th of February, 1847, the general assembly of the State of Iowa provided for the election of a board of public works, consisting of a president, secretary, and treasurer. To this board the whole subject of receiving and managing the lands and providing for the construction of the improvement was committed. On the (2d) second of August, (1847) eighteen hundred and forty-seven, the board was duly elected, and was fully organized, and went into operation on the (22d) twenty-second of September following. On the (23d) twenty-third of February, (1848) eighteen hundred and forty-eight, the Commissioner of the General Land Office wrote to the board of public works as follows:

"GENERAL LAND OFFICE, *February 23d*, 1848.

"SIR: Your communication of the 29th of November last, enclosing a copy of yours of the 22d September last, has been received, and would have received an earlier response, but for the erroneous and defective surveys along the Des Moines river, which prevented this office from submitting to the Secretary of the Treasury the selections made by the State of Iowa for the improvement of the navigation of that river, under the act of the 8th of August, 1846. As these surveys have been corrected, action will be had on these selections as soon as possible, and when approved they will be certified to you.

"It is not usual to furnish more than a diagram of the grant in cases of this kind, with a certified list of the tracts granted as above mentioned; and these will, of course, be transmitted as they can be prepared.

"All the aid that this office can give the board of public works, in the discharge of its duties, will be cheerfully rendered, and, if it is possible to procure copies of the reports of the topographical bureau of the examinations heretofore made of the Des Moines river, it will afford me pleasure to do so, and forward them to you.

"A question has arisen as to the extent of the grant made to Iowa, by the act of 8th of August, 1846, and the opinion of this office has been requested on that point.

"By the terms of the law, the grant is of an equal moiety in alternate sections of the public lands remaining unsold, and not otherwise disposed of, incumbered, or appropriated, in a strip of five miles in width on each side of the river, to be selected within said Territory, &c., &c., and the proceeds are to be applied in the improvement of the navigation of that river, from its mouth to the Raccoon Fork. Hence the State is entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river, within the limits of Iowa.

"Very respectfully your obedient servant,

"RICHARD M. YOUNG, *Commissioner.*

"CHARLES CORKERY, Esq.,

"*Secretary of the Board of Public Works, Fairfield, Iowa.*"

On the (19) nineteenth of June, (1848,) eighteen hundred and forty-eight, without any notice of a change of opinion, a proclamation was issued, signed by the President, and countersigned by the Commissioner of the General Land Office, ordering into the market some of the lands which lay above the Raccoon Fork, and which would belong to the State according to the rule laid down in the aforesaid letter of the (23) twenty-third of February, (1848,) eighteen hundred and forty-eight. The sale was to take place on the (16) sixteenth of October, 1848.

On the (18th) eighteenth of September, (1848,) eighteen hundred and forty-eight, the board of public works, through its secretary, wrote to the Commissioner of the General Land Office, as follows:

"OFFICE OF THE BOARD OF PUBLIC WORKS,

"*Keokuk, Iowa, 18th September*, 1848.

"SIR: The attention of this office has been called to the proclamation of the President of the United States, bearing date the 19th of June last, for the sale of lands in Iowa, by which I perceive that lands donated to this State for the improvement of the Des Moines river are to be offered for sale at Iowa City on Monday, the 16th October next. These lands are situated above the Raccoon Fork of the Des Moines river, in township Nos. 79, 80, range Nos. 25, 26, &c., and a sale by the United States will be in conflict with your opinion, expressed to me in your letter of the 23d of February last, in which you say that 'the State is entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river, within the limits of Iowa.'

"Your very liberal opinion has influenced this board to place sixty miles of the contemplated improvement under contract, in addition to the thirty miles first let; and the State would now be greatly embarrassed by any impediments to her favorable prospects in this regard. We believe that the fact of having those

lands embraced in the proclamation was an oversight, without any intention to curtail the resources of the State, and that it would be corrected on being discovered.

"Very respectfully, your obedient servant,

"CHARLES CORKERY.

"Hon. R. M. YOUNG, *Commissioner G. L. O.*"

To this letter no reply was returned. On the same day the following protest was sent to the land office at which the sale was ordered to take place, for the purpose of being filed therein:

"OFFICE OF THE BOARD OF PUBLIC WORKS,
"*Keokuk, Iowa, 18th September*, 1848.

"SIR: I enclose you a copy of a letter which I have transmitted by this day's mail to the Commissioner of the General Land Office, and take this opportunity of protesting against the sale of the lands therein referred to.

"This protest is based not only on the act of Congress donating lands to the State of Iowa, for the improvement of the Des Moines river, but also on the decision of the Commissioner of the General Land Office, bearing date 23d February, 1848, in words as follows:

"'A question has arisen as to the extent of the grant made to Iowa by the act of the 8th of August, 1846, and the opinion of this office has been requested on that point. By the terms of the law, the grant is of one equal moiety, in alternate sections, of the public lands remaining unsold, and not otherwise disposed of, incumbered, or appropriated, in a strip five miles in width on each side of the said river, to be selected within said Territory, &c., and the proceeds are to be applied in the improvement of the navigation of said river, from its mouth to the Raccoon Fork. Hence, the State is entitled to the alternate sections within five miles of the Des Moines river, throughout the whole extent of that river, within the limits of Iowa,'"

"As this board has had no information that this opinion has been rescinded, we are of the opinion that he will inform you on the subject within the two weeks prescribed for the continuance of the sale."

"Respectfully,

"CHARLES CORKERY, *Sec'y B. P. W.*

"C. NEELY., Esq., *Register.*"

The following letter was written by the senators and representatives of Iowa, on the day of its date:

"CONGRESS, *January 8th*, 1849.

"SIR: During the last summer we were much surprised to see lands proclaimed for sale by the President of the United States, which had been declared by the General Land Office, and considered by the people of Iowa, as the property of that State, under the act of 8th of August, 1846, 'granting certain lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, in said Territory.'

"On inquiring of the Commissioner of the General Land Office as to the reasons for this course, he informed us that he had changed his original opinion as to the extent of this grant, and was now inclined to think that it was limited to the Raccoon Fork; but no official promulgation of this opinion has yet been given, except negatively, by proclaiming the lands as above mentioned.

"The granting clause in the act of August 8th, 1846, is so clear that we are constrained, by a due regard to the interests of the people and State of Iowa, to ask your consideration of the subject; and we are further encouraged to take this course, as the commissioner, we are assured, will be pleased to extend to the State the full complement of the grant, if the law, in your opinion, should bear that construction. This act of 8th August, 1846, is found in the acts of the first session 29th Congress, page 115.

"The first part of the first section designates the object for which the grant was made, to wit: 'There shall be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding the said Territory to improve the navigation of the Des Moines river, from its mouth to the Raccoon Fork, (so called,) in said Territory.'

"The next clause describes the grant and its extent, to wit: 'One equal moiety, in alternate scctions, of the public lands, (remaining unsold, and not otherwise disposed of, incumbered, or appropriated,) in a strip five miles in width on each side of the river.'

"This language is so plain that the extent of the grant is a self-evident proposition, and requires no argument. But the idea is entertained that the improvement governs the extent of the grant. This construction, we beg leave to state, has never obtained. Grants have frequently been made for seats of government, county sites, and the erection of public buildings, but in no case has it been contended that the object of the grant governs the extent of it; otherwise, the act passed by Congress on the same day with that now in consideration (page 140,) 'to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal in the Territory of Wisconsin,' must be con-
21 strued, as running the whole length of the Wisconsin river also, as the limitation of that grant to the Fox river, the lakes through which it passes, and the canal, is not more specific than the terms used to designate the grant for the improvement of the Des Moines river.

"The reason for this extension of the grant to Iowa, above the terminus of the improvement is, moreover, manifest, because near the mouth of the river that improvement will be very expensive, and there the grant does not attach, because the lands on the Missouri side of the river, below Sullivan's line, are in Missouri, and those on the Iowa side are the property of individuals; and further, most of the lands some distance up the Des Moines have been sold by the government, and as the grant is only of the unsold and unappropriated lands in the alternate sections, the only equivalent for those which had been sold, that could be given are the vacant lands far in

the interior from the Mississippi; and hence the terms used in the law.

"As the terms of the act, then, are so clear and explicit, and as the reasons for the extension of the grant, as provided by that act, are so obvious, we respectfully request, in our own behalf, and in behalf of the State and her citizens, who look with that confidence heretofore so fully justified, that you will not withhold the munificence of Congress, and thus cripple this young and rising State in her first great enterprise, and thus involve her in inextricable debt and difficulty. We earnestly request that you will give the necessary instructions for the selections and approval of these lands, along the entire route of the Des Moines, as contemplated by the law, as fast as the surveys are made and returned, and that the lands which belong to the State, which have been inadvertently offered, and which remain unsold, may be withdrawn from the market, and certified to the State also.

"We have the honor to be, with great respect, your obedient servants,

"A. C. DODGE.
"GEORGE W. JONES.
"SHEPHERD LEFFLER.
"WM. THOMPSON.

"Hon. R. J. WALKER,
"*Secretary of the Treasury.*"

The following was the response of the Secretary:

"TREASURY DEPARTMENT, *March* 2, 1849.

"GENTLEMEN: I have the honor to acknowledge the receipt of your communication of 8th January last, and accompanying papers, on the construction of the act of Congress, 'granting lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory,' approved 8th August, 1846. I concur with you in the views contained in your communication, and am of the opinion that the grant in question extends, as therein stated, on both sides of the river from its source to its mouth, but not to lands on the river in the State of Missouri. I have transmitted your communication and accompanying papers, with a copy of this letter, to the Commissioner of the General Land Office.

'I have the honor, &c.,

"R. J. WALKER,
"*Sec. of Treasury.*

"Messrs. A. C. DODGE,
G. W. JONES,
S. LEFFLER,
W. THOMPSON."

On the same day the Secretary transmitted a copy of the above letter to the Commissioner of the General Land Office, with the following order:

"TREASURY DEPARTMENT, *March* 2, 1849.

"SIR: For your information and government on the subject to which it refers, I enclose a copy of a letter addressed by me under this date to members in both houses of Congress from the State of Iowa, with reference to the construction of the act of 8th August, 1846, granting certain lands to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river. I also enclose a letter, to which the within is a reply, and accompanying papers.

"Very respectfully,

"R. J. WALKER.

"R. M. YOUNG, *Commissioner.*"

On the 1st of June, (1849,) eighteen hundred and forty-nine, the Commissioner of the General Land Office wrote as follows to the land office at Iowa city:

"GENERAL LAND OFFICE, *June* 1, 1849.

"GENTLEMEN: The Secretary of the Treasury having decided that the grant to the State of Iowa, under the act of the 8th August, 1846, extended along the Des Moines river to its source, and that it did not stop at the Raccoon Fork, as this office had previously decided, you are hereby directed to withhold from sale all lands situated in the odd-numbered sections within five miles on each side of that river above the Raccoon Fork. Enclosed I send you a diagram, upon which the State selections above that point are colored yellow.

22 "I have also to request that you will make out a list showing the sales and locations which have been made within these selections, as it is designed to endeavor to procure some legislative action on the part of Congress confirmatory of them. The diagram enclosed extends to 83 N., 26 W., being as far as the surveys have progressed in that direction.

"I am, very respectfully, your obedient servant,

"R. M. YOUNG, *Commissioner.*

"REGISTER and RECEIVER, *Iowa City, Iowa.*"

On the nineteenth of December, 1849. the following letter was written by the Commissioner of the General Land Office to Jesse Williams, esq., the then secretary of the board of public works:

"GENERAL LAND OFFICE,
"*December* 19*th*, 1849.

"SIR: A letter has been received at this office from the Hon. A. C. Dodge and the Hon. Geo. W. Jones, enclosing one from you to the former, dated the 30th ult., requesting that you may be furnished with 'a list of the Des Moines river grant above the Raccoon Fork.' In reply, I have to state that said list has not been furnished, for the reason that the posting of the land warrants in the Iowa city district was not completed on the books of this office until recently. Said

list is now in course of preparation, and will be ready for transmission at an early day. In the latter part of your letter you say, 'the lists heretofore forwarded of land below the Fork have been furnished the Secretary of State, instead of the board, who are the rightful and only agents of the State for said land.'

"In the absence of evidence showing the right of another to receive confirmed lists of State grants, it is usual to send them to the Secretary of State. Such is the case at present in relation to this grant. If, however, you will furnish this office with evidence as to your right, as secretary of the board of public works, to receive said lists, and to correspond with this office in relation thereto, they will hereafter receive the desired direction.

"I am, sir, your obedient servant,

"J. BUTTERFIELD, *Commissioner.*

"JESSE WILLIAMS, Esq., *Iowa City, Iowa.*"

On the 14th January, 1850, the Commissioner of the General Land Office made a report to the Secretary of the Interior of the amount of land which had been granted to the several States respectively for internal improvements.

The amount charged against Iowa in the list is 825,078 acres, and the following note is thereto appended: "This amount, in accordance with the decision of the Secretary of the Treasury of the 2d of March, (1849), eighteen hundred and forty-nine, will be increased by the unadjusted portion of the grant for the improvement of the Des Moines river, situated between the Raccoon Fork and the source of said river, estimated to contain about 900,000 acres."

On the 13th of March, 1850, the Commissioner of the General Land Office submitted to the Secretary of the Interior three several lists of land, the first of which had the following heading:

"No. 1, showing the tracts falling within the limits of the Des Moines grant above the Raccoon Fork, &c., under the decision of the Secretary of the Treasury, of March 2d, 1849."

On the 6th of April, 1850, the Secretary of the Interior, who now had the supervision of the General Land Office, made the following decision:

"DEPARTMENT OF THE INTERIOR,

"*Washington, April 6th*, 1850.

"SIR: Having considered the question submitted to me, connected with the claim of the State of Iowa to select, under the act of August 8th, 1846, lands for the improvement of the Des Moines river, I am clearly of the opinion that you cannot recognize the grant as extending above the Raccoon Fork without the aid of an explanatory act of Congress. It is clear to my mind, from the language of the act of August 8th, 1846, itself, that it was not the intent of the act to extend it further. My construction is confirmed by the report of the committee and the accompanying papers. If in any report to Congress you have recognized the grant as extending to the source of the river, it will be proper to correct it, that Congress, if they see fit,

may extend the grant. The opinion expressed by the late Secretary of the Treasury on the subject is entitled to great respect, but I cannot concur in it, and the law not having been carried into effect by him, his opinion merely expressed is open for reversion.

"The lists of selections and other papers submitted with your letter of the 13th ultimo are herewith returned.

"As Congress is now in session, and may take action on the subject, it will be proper, in my opinion, to postpone any immediate steps for bringing into market the lands embraced in the State's selections.

"I am, sir, very respectfully, your obedient servant,

"T. EWING, *Secretary.*

"The COMMISSIONER *of the General Land Office.*"

23 On the 14th of April, 1850, the senators and representatives of Iowa protested against this decision, and appealed therefrom to the President. He referred the matter to the Attorney General (Mr. Johnson,) who, on the 19th July, 1850, made his report, giving it fully as his opinion that, by the terms of the grant itself, it extended along the Des Moines river up to its very source.

Previous to the promulgation of this opinion President Taylor died, and a new cabinet was formed not long afterwards, and before any further action was taken upon this matter. Instead of giving effect to the opinion of Mr. Johnson, the question was submitted anew to the Attorney General, (Mr. Crittenden,) who, on the 30th of June, 1851, decided that, in his opinion, the grant did not extend above the Raccoon Fork.

The Secretary of the Interior, Alex. H. H. Stuart, at first (26th July, 1851) concurred in this opinion, but afterwards consented to bring the whole matter before the President and cabinet, who made a decision as indicated in the following letter :

"DEPARTMENT OF THE INTERIOR,

"*Washington, Oct.* 29, 1851.

"SIR: I herewith return all the papers in the Des Moines case, which were recalled from your office about the first of the present month. I have reconsidered and carefully reviewed my decision of the 26th of July last, and in doing so find that no decision which I can make will be final, as the question involved partakes more of a judicial than of an executive character, which must ultimately be determined by the judicial tribunals of the country; and, although my own opinion on the true construction of the grant is unchanged, yet, in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinion of several eminent jurists, which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State and to approve the selections, without prejudice to the rights, if any there be, of other parties; thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary.

"You will please, therefore, as soon as may be practicable, submit for my approval such lists as have been prepared, and proceed to report for like approval lists of the alternate sections claimed by the State of Iowa above the Raccoon Fork, as far as the surveys have progressed, or may hereafter be completed and returned.

"I am, sir, very respectfully, your obedient servant,

"ALEX. H. H. STUART, *Secretary.*

"To the COMMISSIONER *of the General Land Office.*"

On the following day three lists of lands were prepared in the General Land Office, the heading of which will show their respective purposes, and are as follows:

List No. 1, showing the tracts falling within the limits of the Des Moines grant above the Raccoon Fork of the Des Moines river, so far as the surveys have extended, under the decision of the Secretary of the Treasury of 2d of March, 1849, that such grant extended to the north boundary of the State.

List No. 2, showing tracts disposed of within those limits in the interval between the date of one of the previous orders limiting the grant and one of those extending it above the Fork.

List No. 3, showing the vacant lands subject to the claim of the State.

The third of these lists was presented to the Secretary of the Interior for his approval, to which he appended the following explanatory statement:

"DEPARTMENT OF THE INTERIOR,

"*October 30th*, 1851.

"The selections embraced in the within list (No. 3) are hereby approved, in accordance with the views expressed in my letter of the 29th instant to the Commissioner of the General Land Office, subject to any rights which may have existed at the time the selections were made known at the Land Office by the agents of the State, it being expressly understood that this approval conveys to the State no title to any tract or tracts which may have been sold or otherwise disposed of prior to the receipt, by the local land officers, of the letter of the Commissioner of the General Land Office, communicating the decision of Mr. Secretary Walker, to the effect that the grant extended above the Raccoon Fork.

"ALEX. H. H. STUART, *Secretary.*"

The following amounts of land were, at different times, approved and certified to the State of Iowa, under this grant, all lying above the Raccoon Fork:

October 30th, 1851	214,391.58	acres.
March 10th, 1852	143,908.37	"
December 17th, 1853	33,142.43	"
December 30th, 1853	12,813.51	"
	404,255.89	"

24 Among the lands so certified and approved were the lands mentioned in the pleadings in this suit.

The following is the heading of the list, which was approved by the Secretary of the Interior on the 17th of December, 1853, together with the terms of approval; a similar heading and approval was appended to the list approved on the 30th of the same month: "A list showing the vacant lands in the odd-numbered sections above the Raccoon Fork, and within five miles of the Des Moines river, so far as the surveys have progressed, falling to the State of Iowa under the act of the 8th of August, 1846, as construed by the Secretary of the Treasury in his letter of the 2d of March, 1849, and of the Secretary of the Interior of the 29th of October, 1851, which have not heretofore been approved."

Which list was approved in these words:

"DEPARTMENT OF THE INTERIOR,
"*December* 17, 1853.

"The selections in the within list are hereby approved to the State of Iowa, under the act of the 8th of August, 1846, without prejudice to the rights, if any there be, of other parties.

"R. McCLELLAND,
"*Secretary.*"

The following letter was addressed by the Secretary of the Interior to the Commissioner of the General Land Office, on the day of its date:

"DEPARTMENT OF THE INTERIOR,
"*Washington, August 23d,* 1852.

"SIR: I have examined the question involved in the appeal of honorable A. C. Dodge, George W. Jones, and Bernhart Henn, of Iowa, from the judgment of the Commissioner of the General Land Office, in relation to their application for the issue of patents on the sales and locations of portions of the odd-numbered sections along the Des Moines river, above the Raccoon Fork, which had been made prior to the receipt, by the district land office, of Mr. Secretary Walker's decision of the 2d of March, 1849, and have to state that, as I approved the selections above the Raccoon Fork with the express understanding that that approval should not convey to the State any title to tracts which might have been sold or otherwise disposed of prior to the receipt of Mr. Walker's decision, the issuing of patents on the sales and locations in question is in perfect accordance with the views expressed in my letter to the Commissioner of the 29th of October last, and the terms of approval of the selections on the following day.

"I am, sir, very respectfully, your obedient servant,

"ALEX. H. H. STUART,
"*Secretary.*

"The ACTING COMMISSIONER *of the General Land Office.*"

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"*Secretary.*

"The ACTING COMMISSIONER *of the General Land Office.*"

On the 6th of January, 1854, the Commissioner of the General Land Office wrote to the superintendent of public instruction of the State of Iowa, as follows:

"GENERAL LAND OFFICE,
"*January* 6, 1854.

"SIR: Herewith I enclose a copy of a list of lands falling to the State of Iowa, under the act of 8th of August, 1846, selected by the State under the eighth section of the act of 4th September, 1841, and approved before the grant for the improvement of the Des Moines river was adjusted as far as the township embraced by the lists, which was approved by the Secretary of the Interior on the 30th ultimo. The quantity of land thus approved under the act of 8th of August, 1846, is twelve thousand eight hundred and thirteen and fifty-one hundredths of an acre, (12,813.51.) These lands were selected on the 20th July, 1850, and embraced by lists Nos. 49 to 54, inclusive, and in lieu thereof the State is entitled to select an equal quantity elsewhere.

"Be pleased to acknowledge the receipt of this communication.

"I am, very respectfully, your obed't servant,

"JOHN WILSON,
"*Commissioner.*

"THOMAS H. BENTON, Jr., Esq.,
"*Superintendent Public Instruction, Iowa City, Iowa.*"

In explanation of the foregoing letter, it is admitted that the act of 4th of Sept., 1841, referred to, gave to each of the new States 500,000 acres of land on its coming into the Union. In Iowa this land was devoted to educational purposes. The amount of 12,813.51 acres had been selected as a portion of this grant from among the odd-numbered sections of land lying within five miles of the Des Moines river, and above the Raccoon Fork; and according to the construction of the act of August 8th, 1846, which prevailed when this letter of January 6th, 1854, was written, this land, which had been so selected for the school fund, had been previously appropriated by Congress to the Des Moines river fund. The superintendent of public instruction was, therefore, informed that the State was entitled to select an equal quantity of land elsewhere, in lieu of this amount, which had been erroneously selected for school purposes.

On the 21st of March, 1856, the Commissioner of the General Land Office decided that the grant was limited to the Raccoon Fork. The matter was then brought anew before the Secretary of the Interior, and was by him referred to the Attorney General.

25 The Attorney General (Cushing) delivered an elaborate opinion, in the course of which he said: "In so far as regards selections already approved, whether by yourself or by Mr. Stuart, it is clear that the government cannot undo that. What Mr. Stuart did in this respect with deliberation, what you did without the questions involved being suggested to you, was in each case done by the competent legal authority, and binds the government. One

Secretary has no more lawful power to undo a thing lawfully done by his predecessor in a matter of grant than in a matter of account; no more right where a settlement is in favor of a third party than where it is in favor of the United States. When a thing is decided and done by the head of a department, acting within the scope of his lawful authority, it can be revised by his successor only on the ground of mistake in a matter of fact, or the discovery and production of material new testimony. (Mr. Crittenden's opinion of Dec. 28, 1852, MS.; see, also, Bank of Metropolis *vs.* The United States, XV Peters, p. 400; *ex parte* Randolph, II Brocken, p. 470.)

"If the acts of Mr. Stuart and yourself in this respect had undertaken (as they do not) to dispose of any contending rights of third parties, the latter would have had their remedy at law. But what you have done is final as respects the United States. But have you erred in continuing to follow the line of action which your predecessor had prescribed, and which the commissioner of public lands assumed as settled, in presenting to you for approval lists made out on the premises of the subsisting decision of Mr. Stuart? And if you erred (inadvertently) in thus approving selections made by the State above the Raccoon Fork, shall you now stop and change the rule of action which Mr. Stuart has prescribed to the commissioner? The answer to these questions is not included in the preceding conclusions. It is one thing to undo an act done, and quite another thing to cease to persevere in a previous line of action as to acts of a continuous nature.

"It might, with much plausibility, be argued that while Mr. Walker's order was an opinion merely, and did not bind Mr. Ewing, what Mr. Stuart did, though final as to lands actually approved, is but a precedent when a new list comes up, and may be rejected by you as a precedent, though it cannot be reversed or annulled as a fact: that the disposition of the particular lands made by him is irrevocable, but the principle on which he did it is open to re-examination, as respects any other lands in the same right claimed by the State, and that, in executing the same law, you are to execute it according to your own understanding of its force and effect. That may be so; and yet the contingency is not exactly of the application of a precedent to a new case, for the grant to Iowa is one thing, although it be composed of parts or of new sets of parcels appertaining to the general whole. Mr. Stuart decided to adopt the opinion of Mr. Walker, which carried the grant above the Raccoon Fork; and he proceeded to execute, and did execute, that decision in part. And the true question is, of the completion of the execution by you of what had been partially executed by Mr. Stuart. I think it must be a clear case of manifest illegality in the work commenced and half executed by one secretary, to justify the abandonment of it by his successor. Is the present such a case of palpable violation of law? That cannot be pretended in face of the opinions of Mr. Walker and Mr. Johnson, and the administrative acquiescence in those opinions on the part of Mr. Stuart. In my judgment, it is not for the good of the public service, while it is prejudicial, and sometimes grossly

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unjust, to private interests concerned, for the executive to break off things half done because of mere doubts of the legality of the decisions upon which commencement was made, or even the belief that, upon better reflection at the outset, a different decision would have been rendered. To indulge in such oscillation of action, under the influence of ordinary causes of perturbation, is not seemly on the part of the government.

"In the present case of lands above the Raccoon Fork claimable by the State within its limits, twenty-six fifty-sixth parts—nearly half—the United States have already recognized as belonging to the State. I think you may, if you choose, well consider that a determination of the question proper to be acquiesced in by you as a settled fact of administration." * * * * * * * *

"I advise, therefore, that you propose to the State of Iowa, and its assigns, to acquiesce in and accept the decision of Mr. Stuart as final, and to approve selections accordingly, provided the State or its assigns will themselves agree to acquiesce in and accept that decision as final. If they refuse to treat that decision as final, they cannot expect you to do so. They should be bound if you are. If they consent to enter into satisfactory stipulations of contract to that effect, you can, with safety, award to them the residue of the claim up to the northern boundary of the State."

On the 9th June, 1856, the Secretary of the Interior made the following communication to the Commissioner of the General Land Office:

"DEPARTMENT OF THE INTERIOR,
"*June 9th*, 1856

"SIR: I return herewith the papers in reference to the grant for the improvement of the Des Moines river, which accompanied your report of the 24th of March, and inclose therewith several letters and arguments which have been received here since the date of your report.

"Having submitted the subject to the Attorney General for his opinion upon the questions involved, I inclose a copy of such opinion, furnished me under date of the 29th ultimo, and also a letter under date of the 5th instant, from the Hon. Reverdy Johnson, (the attorney for the claimants under the grant,) in regard to the conditions upon which subsequent approvals, up to the limits of the State of Iowa, are recommended by the Attorney General to be made.

"In the subsequent action upon selections not yet ap-
26 proved, I have concluded to be governed by the advice of the Attorney General, as contained in the paragraph near the close of such opinion, beginning with the words, 'I advise, therefore, that you propose to the State of Iowa and its assigns,' and ending with, 'you can, with safety, award to them the residue of the claim up to the northern boundary of the State.'

"It will be perceived, from the indorsement of Mr. Johnson's letter above referred to, that he has undertaken to procure the assent of the

State and its assigns to the conditions referred to, so that the necessity is obviated of any direct proposition to that effect on the part of the department; but no further action will be taken until the parties are heard from on this point.

"In the certificate of approval hereafter, prepared for my signature on any lists submitted, the fact should be stated that, the approval being based on the prior action of the department, and upon the ground that the grant is to be confined to the northern boundary of the State of Iowa, the acceptance by the State and its assigns would be considered an acquiescence on their part in this limit, and an abandonment of all claim beyond it; as it is upon this basis alone I can feel justified in yielding my assent to the claim preferred.

"Should the assent of the parties be given in writing, the certificate of approval will be so varied from the language above as to conform to that state of facts, but without losing sight of the real groundwork of my assent to the approval.

"Respectfully, your obedient servant,

"R. McCLELLAND, *Secretary.*

To the Hon. THOMAS A. HENDRICKS,

"*Commissioner of the General Land Office.*"

Subsequently, application was made through Hon. Reverdy Johnson the Secretary of the Interior to issue patents for the lands which had been certified and approved to the State of Iowa under the said act of 8th August, 1846.

To this application the Secretary replied as follows:

"DEPARTMENT OF THE INTERIOR,

"*November 10th*, 1856.

"SIR: Having duly considered the subject brought to my attention personally a few days since, and specially referred to in your letter of this date, I have not been able to satisfy myself that the department has any power to issue patents, where the law not only does not authorize it to be done, but provides another mode for the passing of the title to the lands in question; and the practice having been in accordance with this view of the absence of authority, I deem it proper to adhere to it.

"In the opinion of the Attorney General of the 29th May last, in the Des Moines River case, it is stated: 'In so far as regards selections already approved, whether by yourself or by Mr. Stuart, it is clear that the government cannot undo that. What Mr. Stuart did in this respect with deliberation, what you did without the question involved being suggested to you, was in each case done by the competent legal authority, and binds the government. One Secretary has no more lawful power to undo a thing lawfully done by his predecessor in a matter of grant than in a matter of account; no more right where a settlement is in favor of a third party than where it is in favor of the United States. Where a thing is decided and done by the head of a department, acting within the scope of his lawful authority, it can be revised by his successor only on the ground of

mistake in a matter of fact, or the discovery and production of material new testimony. (Mr. Crittenden's opinion of Dec. 28th, 1852, U. S.; see also Bank of Metropolis *vs.* The United States, XV Peters, p. 400; *ex parte* Randolph, II Brocken, p. 470.)

"'If the acts of Mr. Stuart and yourself, in this respect, had undertaken (as they do not) to dispose of any contending rights of third parties, the latter would have had their remedy at law. But what you have *done* is final as respects the United States.'

"In the foregoing views of the Attorney General I have concurred; and for the reason that the acts of approval by Mr. Stuart and myself have divested the United States of the title, I can see still further ground to decline issuing a patent or patents, as that would be assuming that the title had not yet passed, and the question would be yet open for adjustment, like selections not yet approved.

"Respectfully, your obedient servant,

"R. W. McCLELLAND, *Secretary.*

"To Hon. R. JOHNSON, *Baltimore, Md.*"

Among the lands approved and certified to the State of Iowa under said act of 8th August, 1846, on or prior to the 30th Dec., 1853, were the lands mentioned in the declaration in this suit. No lands have been so certified and approved under said act since said 30th Dec., 1853.

All the lands which were so certified and approved to the State of Iowa were, by the General Land Office at Washington, always thereafter (up to the time when the decision of the Supreme Court of the United States was rendered at the December term of 1859–1860, herein stated) reserved from sale or pre-emption, and were by the Land Office considered and held, and on its files and maps were indicated, as appropriated to the special purpose of satisfying the said grant of 8th August, 1846, and as having passed to the State under said grant, and the acts of the government thereunder.

After the making of said grant by the act of 8th Aug., 1846, the State proceeded from time to time, as in said act authorized, to sell and dispose of said lands, applying the proceeds to the improvement of the Des Moines river, as contemplated in said act; and, on 9th June, 1854, the State, by its authorized agents, made a contract with the said defendants, the Des Moines Navigation and Railroad-
27 Company, in and by which the said company agreed to finish said improvement, as contemplated in said act of Congress, and specified in said contract, and to expend for that purpose all necessary sums, to the amount of $1,300,000; and in consideration of such contract and expenditure, and in payment for the same, the State sold and agreed to convey to said company from time to time, and in the manner provided by said act of Congress, the whole balance of the lands which had been certified and approved to the State under said act, and which then remained unsold, and all other lands which should be thereafter certified and approved to the State of Iowa under said act.

Among the lands thus sold to said company were the lands mentioned in the declaration in this suit.

After the making of said contract, the said company proceeded with the work upon said improvement, and as the said improvement progressed, and in accordance with said act of Congress, the State from time to time, by its regular and authorized officer, issued to said company, in payment for work done by it upon said improvement, and in pursuance of the aforesaid contract, sundry certificates, in form and substance as follows:

"OFFICE REGISTER OF THE DES MOINES RIVER IMPROVEMENT,
"*Ottumwa, May* 14, 1855.

"I certify that the following lands were sold by me on this day of , to the Des Moines Navigation and Railroad Company, in pursuance of the contracts and agreements with the said company for the construction of said Des Moines river improvement, to wit:"

(Here follows a long list of lands set forth specifically by section, township, and range, together with the number of acres in each tract, respectively, including the lands mentioned in the declaration in this suit.)

(Signed) "GEORGE GILLESPIE, *Register, &c.*"

The said George Gillespie was at the said dates register of the Des Moines improvement, and was the proper person to transfer said lands and issue the said certificates.

The General Land Office decided, in 1856, not to certify any more lands to the State under the grant of 8th Aug., 1846. Thereupon the said defendants sustained the work upon said improvement, and afterwards said company and the State made a final settlement, as follows:

The general assembly of said State, on 22d March, 1858, passed a joint resolution, as follows:

"Whereas the Des Moines Navigation and Railroad Company have heretofore claimed, and do now claim, to have entered into certain contracts with the State of Iowa, by its officers and agents, concerning the improvement of the Des Moines river, in the State of Iowa; and whereas disagreements and misunderstandings have arisen, and do now exist, between the State of Iowa and said company, and it being conceived to be to the interest of all parties concerned to have said matters, and all matters and things, between said company and the State of Iowa, settled and adjusted: Now, therefore, be it—

"*Resolved by the General Assembly of the State of Iowa*, That for the purpose of such settlement, and for that purpose only, the following propositions are made by the State to said company: That the said company shall execute to the State of Iowa full releases and discharges of all contracts, agreements, and claims with or against the State, including rights to water rents which may have heretofore or do now exist, and all claims of all kinds against the State of Iowa and the lands connected with the Des Moines river improvement, excepting such as

are hereby by the State secured to the said company; and also surrender to said State the dredge-boat and its appurtenances, belonging to said improvement; and the State of Iowa shall, by its proper officer, certify and convey to the said company all lands granted by an act of Congress approved August 8th, 1846, to the then Territory of Iowa, to aid in the improvement of the Des Moines river, which have been approved and certified to the State of Iowa by the general government, saving and excepting all lands sold or conveyed, or agreed to be sold or conveyed, by the State of Iowa, by its officers and agents, prior to the 23d day of December, 1853, under said grant. And said company or its assignees shall have right to all of said lands as herein granted to them as fully as the State of Iowa could have under or by virtue of said grant, or in any manner whatever, with full power to settle all errors, false locations, omissions, or claims in reference to the same, and all pay or compensation therefor by the general government, but at the costs and charges of said company, and the State to hold all the balance of said lands, and all rights, powers, and privileges under and by virtue of said grant, entirely released from all claim by or through said company. And it is understood that among the lands excepted and not granted by the State to said company are 25,487 $\frac{87}{100}$ acres, lying immediately above Raccoon Fork, supposed to have been sold by the general government, but claimed by the State of Iowa.

"And it is further agreed that said company release and convey to the State of Iowa, or its representatives, all materials of every kind and description, prepared for or intended for the construction of locks or dams in said improvement, wheresoever the same may be; and the State shall take the existing contracts, but no other liabilities of any name or nature except as herein provided, for constructing or repairing the works on said improvement at Keosauqua, Bentonsport, Plymouth, and Croton, and no other or different, with all liabilities and advantages arising upon said contracts, and percentage retained thereon, excepting that the company shall pay all estimates for work done or material prepared up to this date, beyond the percentage retained from the contractors under their agreements. And the said company shall be discharged from all liability for the claims of the officers of the State for services or salaries.

28 "The said company hereby agree to pay the State the sum of twenty thousand dollars, which sum shall be paid to the order of the commissioner of the Des Moines river improvement, (as fast as he may require the same, to liquidate existing liabilities against said Des Moines river improvement,) on thirty days' notice given to said company at their office in the city of New York; and any bonds or certificates of indebtedness against said improvement, not exceeding in amount the sum of $11,000, which are now due and unpaid, are to be received in part payment of said sum of twenty thousand dollars: *Provided*, That no liabilities assumed by the State in this contract shall be a charge against the State in her sovereign capacity, but all such liabilities, if any, shall be chargeable upon and payable out of the remaining lands belonging to the Des

Moines river grant: *And provided, also*, That if Congress shall permit a diversion of the lands of said Des Moines river grant, or the title thereto shall become vested in the State, so as to become subject to grant, the said remaining lands, after the payment of all the liabilities as aforesaid against said improvement, and the completion of such locks and dams on the Des Moines river as the legislature shall direct, shall be granted to the Keokuk, Fort Des Moines, and Minnesota Railroad Company, to aid in the construction of a railroad up and along the valley of the Des Moines river, upon such terms and in such manner as the legislature may provide, one-fourth of which said lands shall be applied by said company to aid in the construction of said road above the city of Des Moines: *And provided, further*, That if the said Des Moines Navigation and Railroad Company shall ratify and accept these propositions for a contract by filing a written acceptance thereof in the office of the secretary of State within sixty days from the passage of this joint resolution, then this contract shall be in force and bind both of the parties thereto."

The Des Moines Navigation and Railroad Company ratified and accepted the proposition embodied in the joint resolution within the time and in the manner therein specified. The company paid to the State the sum of $20,000 in cash, and released and conveyed to the State the dredge-boat and materials in said resolution mentioned, which were of the cash value of more than $100,000, and in all respects, on its part, fully complied with all the terms of settlement said joint resolution provided; and the State, on the 18th day of May, 1858, executed and delivered to the defendants a deed and grant under the seal of the said State, of which the following is a copy:

"This indenture, made this 18th day of May, one thousand eight hundred and fifty-eight, by and between the State of Iowa, party of the first part, and the Des Moines Navigation and Railroad Company, parties of the second part, witnesseth: That the said party of the first part, for and in consideration of one dollar paid by the parties of the second part, and in pursuance of the contracts and agreements between the State of Iowa and the said Des Moines Navigation and Railroad Company, for the improvement of the navigation of the Des Moines river, in the State of Iowa, and in pursuance of a joint resolution of the general assembly of the State of Iowa, approved the 22d day of March, 1858, does hereby sell, grant, bargain, and convey to the said Des Moines Navigation and Railroad Company the following described lands, to wit: All lands granted by an act of Congress approved August 8th, 1846, to the then Territory of Iowa, to aid in the improvement of the Des Moines river, which have been approved and certified to the State of Iowa by the general government, saving and excepting all lands sold or conveyed, or agreed to be sold or conveyed, by the State of Iowa, by its officers and agents, prior to the 23d day of December, 1853, under said grant. And said company or its assigns shall have right to all of said lands so herein granted to them as fully as the State of Iowa could have under or by virtue of said grant, or in any manner whatever, with full power to

settle all errors, false locations, omissions, or claims in reference to the same, and all pay or compensation therefor by the general government, but at the costs and charges of said company; and the State to hold all the balance of said lands, and all rights, powers, and privileges under and by virtue of said grant, entirely released from any claim by or through said company. And it is understood that, among the lands excepted and not granted by the State to said company, are 25,487.87 acres lying immediately above Raccoon Fork, supposed to have been sold by the general government, but claimed by the State of Iowa.

"To have and to hold the above-described lands, and each and every parcel thereof, with all the rights, privileges, immunities, and appurtenances of whatever nature thereunto belonging or appertaining, unto the Des Moines Navigation and Railroad Company, their successors and assigns forever, in fee simple.

"In testimony whereof, I, Ralph P. Lowe, governor of the State [L. S.] of Iowa, have caused the great seal of the State of Iowa to be hereunto affixed.

"Given under my hand, at the city of Des Moines, the day and year first above written, and of the State of Iowa.

"By the governor,

"RALPH P. LOWE.

"ELIJAH SELLS,

"*Secretary of State.*

"By JNO. M. DAVIS, *Deputy.*

"This is to certify that the foregoing deed was received from the governor, June 10th, 1858, and recorded in Des Moines river record book 'A,' pages 45 and 46, June 18, 1852 (62).

"T. S. PARRIN,

"*Register of State Land Office,*

"By D. S. WARREN, *Deputy.*"

29 Said State caused said patent to be duly recorded in Iowa, and also filed an original or copy of said patent in the office of the Commissioner of the General Land Office at Washington, with a list of the lands intended to be conveyed thereby, amounting to 213,483.39 acres, of which the lands mentioned in the declaration in this suit were part.

On the 3d May, 1858, said State also executed and delivered to the defendants a certain other deed or patent, under the seal of the State, as follows:

"This indenture, made this third day of May, one thousand eight hundred and fifty-eight, by and between the State of Iowa, party of the first part, and the Des Moines Navigation and Railroad Company, parties of the second part, witnesseth:

"That the said party of the first part, for and in consideration of one dollar paid by the parties of the second part, and in pursuance of the contracts and agreements between the State of Iowa and the said Des Moines Navigation and Railroad Company, for the improve-

ment of the Des Moines river, does hereby sell, grant, bargain, and convey to the said Des Moines Navigation and Railroad Company the following referred to and described lands, to wit:"

(Here follows a description of several thousand acres of land, set forth specifically by section, township, and range, including the lands mentioned in the declaration in this suit.)

"To have and to hold the above-described lands, and each and every parcel thereof, with all the rights, privileges, immunities, and appurtenances of whatever nature thereunto belonging or appertaining, unto the Des Moines Navigation and Railroad Company, their successors and assigns, forever, in fee simple.

"In testimony whereof, I, Ralph P. Lowe, governor of the State of Iowa, have caused the great seal of the State of Iowa to be hereunto affixed.

"Given under my hand, at the city of Des Moines, the day and year first above written, and of the State of Iowa the twelfth year.

{ The great seal of the State of Iowa. }

"By the governor,

"RALPH P. LOWE.
"ELIJAH SELLS,
"*Secretary of State.*"

"This is to certify that the foregoing deed was received from the governor, June 10, 1858, and recorded in Des Moines river records, book A, pages 41, 42, 43, and 44, June 18, 1858.

"T. S. PARRIN,
"*Register of the State Land Office.*
"By D. S. WARREN, *Deputy.*"

At the December term of the Supreme Court of the United States, held in 1859-1860, a decision was rendered as to the proper legal construction of the act of 8th August, 1846. The decision was in the case of Litchfield *vs.* The Dubuque and Pacific Railroad Company, and was reported in 23 Howard, 66.

On the 2d March, A. D. 1861, the Congress of the United States passed a joint resolution, providing that "all the title which the United States still retain in the tracts of land along the Des Moines river, and above the mouth of the Raccoon Fork thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior, as part of the grant by act of Congress approved August 8, 1846, and which is now held by bona fide purchasers under the State of Iowa, be, and the same is hereby, relinquished to the State of Iowa."

By a subsequent act, approved July 12, 1862, Congress enacted "that the grant of lands to the then Territory of Iowa for the improvement of the Des Moines river, made by the act of August 8, 1846, is hereby extended so as to include the alternate sections (designated by odd numbers) lying within five miles of said river, between the Raccoon Fork and the northern boundary of said State. Such lands are to be held and applied in accordance with the original

grant," &c. By the statutes of Iowa it is provided that "where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, enures to the benefit of the grantee." Code of Iowa, (revision of 1860,) p. 390, section 2,210.

The plaintiff claims that the defendants did not acquire any title by means of anything in this agreed statement set forth; and also that the title to the lands in question was transferred to the Dubuque and Pacific Railroad Company and its assigns, (whereby the title of the defendants and of the plaintiff failed,) as hereinafter set forth, that is to say:

On the 15th May, 1856, Congress passed an act as follows:

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi river to a point on the Missouri river, near the mouth of Platte river; from the city of Davenport, Iowa City and Fort Des Moines, to Council Bluffs; from Lyons city, northwesterly to a point of intersection with the main line of the Iowa Central Air-Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel, across the said State of Iowa to the Missouri river; from the city of Dubuque to a point on the Missouri river near Sioux city, with a branch from the mouth of the Tete Des Morts to the nearest point on said road, to be completed as soon as the main road is completed to that point, every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sactions or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Iowa, for the use and purpose aforesaid: *Provided*, That the land to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads: *Provided, further*, That the lands hereby, granted for and on account of said roads, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses; and the same shall be applied to no other

purpose whatsoever: *And provided, further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, or for any other purpose whatsoever, be, and the same are hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States.

"SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by such grant shall remain to the United States within six miles on each side of said roads, shall not be sold for less than the double minimum price of the public land when sold; nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

"SEC. 3. *And be it further enacted*, That the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof for the purpose aforesaid, and no other. And the said railroads shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

"SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold; and so from time to time until said roads are completed. And if any of said roads are not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States.

"SEC. 5. *And be it further enacted*, That the United States mail shall be transported over said roads, under the direction of the post office department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law, the Postmaster General shall have the power to determine the same."

On the 14th July, 1856, the general assembly of the State of Iowa passed an act, as follows:

"AN ACT to accept of the grant and carry into execution the trust conferred upon the State of Iowa, by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15th, 1856.

"SECTION 1. *Be it enacted by the general assembly of the State of Iowa*,

That the lands, rights, powers, and privileges granted to and conferred upon the State of Iowa, by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15th, 1856, be, and the same are hereby, accepted upon the terms, conditions, and restrictions contained in said act of Congress.

"SEC. 2. That so much of the lands, interest, rights, powers, and privileges as are or may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a
31 railroad from Burlington, on the Mississippi river, to a point on the Missouri near the mouth of Platte river, are hereby disposed of, granted, and conferred upon the Burlington and Missouri River Railroad Company, a body corporate, created and existing under the laws of the State of Iowa.

"SEC. 3. That so much of the lands, interest, rights, powers, and privileges as are or may be granted and conferred in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from Davenport, via Iowa City and Fort Des Moines, to Council Bluffs, are hereby disposed of, granted, and conferred to and upon the Mississippi and Missouri Railroad Company, a body corporate, created and existing under the laws of the State of Iowa.

"SEC. 4. That so much of the lands, interest, rights, powers, and privileges as are or may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air-Line Railroad near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel, across the said State to the Missouri river, are hereby disposed of, granted, and conferred to and upon the Iowa Central Air-Line Railroad Company, a body corporate, created and existing under the laws of the State of Iowa.

"SEC. 5. That so much of the lands, interest, rights, powers, and privileges as are or may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri river at or near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road, to be completed as soon as the main line is completed to that point, are hereby disposed of, granted, and conferred to and upon the Dubuqe and Pacific Railroad Company, a body corporate, created and existing under the laws of the State of Iowa.

"SEC. 6. The lines and routes of the several roads above described shall be definitely fixed and located on or before the first day of April next, after the passage of this act, and maps or plats, showing such lines and routes, shall be filed in the office of the governor of the State of Iowa, and also in the office of the secretary of state of the State of Iowa. It shall be the duty of the governor, after affixing his official signature, to file such map in the department having the control of the public land in Washington; such location being considered final only so far as to fix the limit and boundary within which

lands may be selected ; and if it shall appear that the lands that have been donated by the act of Congress aforesaid for the construction of the several lines above indicated cannot be obtained by said companies within the limits and along any part of the lines aforesaid, the governor shall from time to time appoint agents to make such selections as may be authorized or granted by Congress for the lines aforesaid; but the compensation of such agents, and the costs, expenses, and charges attendant upon and occasioned by making such selections, shall be fixed, regulated, paid, and borne by each of said railroad companies, respectively, upon and for its own line.

"SEC. 7. The Iowa Central Air-Line Railroad Company shall furnish, equip, and operate the branch of their railroad that will be constructed under this grant from Lyons City to the point of intersection with the main line of their road near Maquoketa, in the same manner with their main line from the west, and as completely as though the same was a continuation of said main line, and shall never give any preference to the main line of said road, or any part thereof, as defined in their articles of incorporation, by business arrangements, tariff of prices, or otherwise, over the said branch to their railroad.

"SEC. 8. The grants aforesaid are made to each of said companies, respectively, upon the express condition that in case either of said railroad companies shall fail to have completed and equipped seventy-five miles of its road within three years from the first day of December next, thirty miles in addition in each year thereafter, for five years, and the remainder of their whole line of road in one year thereafter, or on the first of December, A. D. 1865, then and in that case it shall be competent for the State of Iowa to resume all rights conferred by this act upon the company so failing, and to resume all rights to the lands hereby granted and remaining undisposed of by the company so failing to have the length of road completed in manner and time as aforesaid.

"SEC. 9. The roads aforesaid shall be constructed upon a gauge with a width of four feet eight and one-half inches, and the iron used in the track shall be of approved quality and pattern; and the said roads shall be completed and finished in a style and of a quality equal to the average of other first-class western roads. And when the roads, or any of them authorized to be constructed by this act, shall be intersected by the roads of any other railroad company now constructed, or hereafter to be constructed, it shall be the duty of such road or roads receiving the benefit of this act to furnish all proper and reasonable facilities, and to join such other company in making all necessary crossings, turnouts, sidelings, and switches, and other conveniences necessary for the transportation of all freight and passengers over either or any road or roads hereby mutually accommodated, whether said passengers or freight are brought by the roads benefitted by this act, or any other road or roads now constructed or which may hereafter be constructed, and at such rates as shall not, in any case, exceed the regular tariff of charges on such road or roads.

"SEC. 10. All persons who, at the time said grant was made, held valid claims, by actual occupation and improvement, upon any of the

lands embraced in said grant, shall be protected in the same, and entitled to purchase and enter the same upon the terms and conditions hereinafter provided.

"SEC. 11. Any person wishing to avail himself of the provisions of this act shall, within three months of the passage thereof, file his application for that purpose with the judge of the county where such lands may be situate, and shall prove, to the satisfaction of the
32 said judge, that his claim is valid, and that the same existed at the time said grant was made; and upon such proof being made, such judge shall give to the applicant a certificate of the fact, and such certificate shall entitle the holder, or his *bona fide* assignee, to enter such land at the rate of two dollars and fifty cents per acre : *Provided*, That no person claimant, or the assignee of a claim, shall be entitled to more than one hundred and sixty acres of land under this act : *And provided, further*, That the person asserting a claim, whether as claimant or assignee, shall file his affidavit that he has not, either directly or indirectly, received the benefits of the provisions of this act. Before any rights shall be acquired under such certificate, a copy of the same, together with the evidence, shall be served on the secretary of the company interested, and such company shall have the right to appeal from the decision of such judge to the district court, in the same manner as appeals are taken from the decisions of justice of the peace, at any time within ninety days after the service of such papers; and the same shall be tried as other appeal cases, and an appeal may be taken to the Supreme Court by either party in the same manner as appeals in other cases.

"SEC. 12. Such certificates, on being filed with the secretary of the company upon whose line of road such lands may be situate, when no appeal has been taken as herein provided, shall entitle the holder or his assignee to the possession of said land, until the title shall become vested in the company. Upon payment thereafter to the treasurer of the company for said land at the price above designated, such person shall receive from the secretary of said company a patent to such land, not exceeding in quantity one hundred and sixty acres. Such deed or patent shall vest in the purchaser all the title of said company in and to such lands, except so far as to reserve to the company all such right of way and station grounds as may be actually necessary for the uses of the company.

"SEC. 13. The said companies shall each severally assent to and accept the provisions of this act, by a written instrument, under the seal of such corporation, with the signatures of the proper officers, within ninety days after the passage of this act, which said acceptance shall be filed in the office of the secretary of state, and by by the secretary recorded in the book by him kept for the recording of articles of association.

"SEC. 14. Said railroad companies accepting the provisions of this act, shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the general assembly of Iowa, not inconsistent with the provisions of this act, and the act of Congress making the grant.

"SEC. 15. It shall be the duty of the companies receiving the

benefits of this act, to make a regular annual report of their proceedings at the usual time and place of electing their officers, exhibiting a detailed statement, as far as practicable, of the amount of their expenditures, liabilities, &c., a copy of which shall be filed in the office of the secretary of state.

"SEC. 16. *Be it further enacted*, That any of said companies accepting the grants of lands under this act shall take the same with the conditions imposed and incumbrances specified in this act, and shall in no event have any claim or recourse whatever upon the State of Iowa, for a misapplication of said grant, incumbrances or conditions in this act imposed.

"SEC. 17. This act shall take effect and be in force from and after its publication in the Iowa Capital Reporter, and Iowa City Republican."

The act was duly published in the papers mentioned.

The Dubuque and Pacific Railroad Company, mentioned in the 5th section of said act, was organized under the laws of Iowa. Article I of its articles of incorporation was as follows:

"L. H. Langworthy, H. A. Sanford, Platt Smith, John J. Dyer, J. P. Farley, R. B. Mason. F. V. Goodrich, Robert C. Waples, M. Mobley, G. R. West, Asa How, F. S. Jesup, Edward Stimson, Geo. W. Jones, Robert Waller, Robert Scuhyler, and their associates, and all such persons as shall hereafter become stockholders in the company hereby incorporated, hereby form themselves into a body corporate, under the name and style of the 'Dubuque and Pacific Railroad Company,' for the purpose of constructing a railroad from some point in the city of Dubuque, thence westerly on the best route towards the Pacific Ocean."

In July, 1856, said company passed and filed with the secretary of the State of Iowa, resolutions in the following words:

"*Resolved*, That the Dubuque and Pacific railroad company hereby assent to and accept the provisions of an act enacted by the general assembly of the State of Iowa, and approved July, 1856, entitled an act to accept of the grant to carry into execution the trust conferred upon the State of Iowa, by an act of Congress entitled an act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State, approved May 15th, 1856.

"*Resolved*, That the president and secretary of the Dubuque and Pacific Railroad Company be, and they hereby are, required to affix their signatures to the above resolutions, and have the same filed in the office of the secretary of the State of Iowa forthwith.

"J. P. FARLEY, *President.*

"Attest:

[L. S.] "H. P. LEECH, *Secretary of D. & P. R. R. Co.*"

33 The following letter was addressed by the Commissioner of the General Land Office to the secretary of the State of Iowa:

"GENERAL LAND OFFICE, *August 20th*, 1856.

"To GEO. W. MCCLEARY, Esq.,

"*Secretary of the State of Iowa, at Iowa City.*

"SIR: I have the honor to acknowledge the receipt of your communication of the 12th instant, enclosing a certified copy of the act of the State legislature, approved on the 14th July, 1856, to accept the grant, and to carry into execution the trust conferred upon the State of Iowa by the act of Congress, making the grant of lands for railroad purposes, approved May 15th, 1856, which has been placed on the regular files in this office.

"It is observed, that the 6th section of the law directs that 'it shall be the duty of the governor, after affixing his official signature, to file such map in the department having control of the public land in Washington, *such location being considered final only so far as to fix the limits and boundary within which lands may be selected*'—the part which I have italicised appears to me to conflict directly with the act of Congress, which contemplates that the route shall be 'definitely fixed.' And it is proper that I should, through you, in this early stage of the business, call the attention of the State executive and the companies to the matter, and announce the opinion of this office, so as to prevent unnecessary delay. A route merely for fixing the limits of the grant will not be acted upon here; it must be something real and fixed; the grant cannot be in one place, and the actual route in another; although slight variations on the line, such as are unavoidable in the progress of the construction of such works, would be admissible, any *material changes* of route would be considered as acting in bad faith with the United States, and cannot be tolerated. For such would be a clear violation of the law, which proposes an indemnity to the United States, for the lands granted away, by the enhanced value of the alternate sections remaining to the government near the route of the road; the route must therefore be first 'definitely fixed,' as required by the law of Congress, or no title vests.

"In the above view, it will be expected that the certificate of the governor on the maps returned to this department will set forth that such maps delineate the routes as '*definitely* fixed'—that is, that they are final locations—before they can receive our action.

"I am, respectfully, your obedient servant,

"JOS. S. WILSON, *Acting Commissioner*."

On the 30th September, 1856, said company filed in the office of the secretary of said State of Iowa, a certificate as follows:

"OFFICE OF THE DUBUQUE AND PACIFIC RAILROAD CO.,
"*Dubuque*, *September* 27*th*, 1856.

"It is hereby certified, that in pursuance of the act of the legislative assembly of the State of Iowa, approved July 14th, 1856, entitled 'An act to accept of and carry into effect the trust conferred on the State of Iowa by an act of Congress,' entitled 'An act making a grant of lands to the State of Iowa,' in alternate sections, to aid in the construction of certain railroads in said State, approved May 15th, 1856.

"This map shows the location of the line and route of the Dubuque and Pacific railroad from the city of Dubuque to a point on the Missouri river, at Sioux City, with a branch from the mouth of the Tete des Morts to the nearest point on said road, as definitely fixed, in in compliance with said act of Congress and in pursuance of a resolution of the board of directors of said railroad company passed on the 26th day of May, 1856, directing B. B. Provoost, chief engineer of said road, to locate and definitely fix said route.

"And that so much of the field work as is dated on said map since the 26th day of May last was done in pursuance of said resolution. That so much of the field work as is dated on said map anterior to the 26th day of May last was located at the time indicated by said dates, in pursuance of several resolutions of said board directing said engineer to locate the same.

"In testimony whereof, the Dubuque and Pacific Railroad Company has hereunto attached its corporate seal, and caused the [L. S.] same to be signed by its president and engineer, at Dubuque, this 27th day of September, A. D. 1856.

"J. P. FARLEY, *President.*
"B. B. PROVOOST *Engineer.*

"Attest: H. P. LEECH,
"*Sec'y of D. & P. R. R. Co.*"

"Filed Sept. 30th, 1856.
"GEO. W. McCLEARY, *Secretary of State.*"

The land mentioned in the pleadings in this suit is within six miles of the line or route of the road shown on said map or plot; said route, as shown on said map or plot, is on the general route of the road designated by the act of Congress of 15th May, 1856.

At the time said act of 14th July, 1856, was passed by the general assembly of Iowa, and on said 30th day of September, 1856, no portion of said road had been actually constructed. And no part of said road was completed until May 11, 1857, when the first thirty miles, extending westerly from Dubuque, were opened for business. During the year 1857 eight miles more were completed. The said Dubuque and Pacific Railroad Company did not have 75 miles of said road completed and equipped within three years from the first day of December, 1856; nor thirty miles in addition in each year thereafter, as required by the aforesaid act of the general assembly of Iowa, passed 14th July, 1856.

The said road had not been completed to any point nearer than one hundred and ten miles distant from said land at the time of the passage of the joint resolution of Congress on 2d March, 1861. And it had not been completed to any point nearer than ninety miles distant from said land at the time of the passage of the act of Congress on 12th July, 1862. But the general assembly of the State of Iowa, on the 7th March, 1860, passed an act as follows:

"AN ACT extending the time for completion of 75 miles of road by the Dubuque and Pacific Railroad Company.

"Whereas it has been represented that the Dubuque and Pacific Railroad Company did not complete seventy-five continuous miles of said road by the first day of December last, as required by the 8th section of the act approved fourteenth July, A. D. 1856, commonly called the land grant act, but have since completed the same; therefore,

"SEC. 1. *Be it enacted by the general assembly of the State of Iowa*, That said subsequent completion of said seventy-five miles shall be deemed a substantial compliance with the provisions of said section by said company."

And on the 26th March, 1860, the said general assembly passed another act as follows:

"AN ACT entitled an act declaratory of the meaning of an act entitled an act for extending the time of completion of 75 miles of road by the Dubuque and Pacific Railroad Company, approved 7th March, 1860.

"Whereas the first section of the act above recited reads as follows:

"*Be it enacted by the general assembly of the State of Iowa*, That said subsequent completion of said seventy-five miles shall be deemed a substantial compliance with the provisions of said section by said company.

"SECTION 1. Now, therefore, *be it enacted by the general assembly of the State of Iowa*, That said first section shall be considered, and is hereby declared to mean, that said completion of said seventy-five miles by said company shall be deemed to be a substantial compliance by said company with that portion of said 8th section which required seventy-five miles of said road to have been finished by the first day of December last."

The Secretary of the Interior has certified and approved to the State of Iowa, under the act of May 15, 1856, in all, $2,540,024\frac{64}{100}$ acres, of which quantity $1,147,481\frac{1}{100}$ acres have been for and on account of the road mentioned in said act of Congress, from the city of Dubuque to a point on the Missouri river, near Sioux City.

The State of Iowa has not conveyed to said Dubuque and Pacific Railroad Company the lands mentioned in the pleadings in this suit, nor any of the lands so certified and approved to the State under the act of the 8th August, 1846, unless said act of the general assembly of 14th July, 1856, shall be held to have conveyed the same. And it has not in any manner transferred or conveyed, or attempted to transfer or convey said lands, or any of them, to said Dubuque and

Pacific Railroad Company, or to any other party whatever, except to the Des Moines Navigation and Railroad Company, unless it be by said act of 14th July, 1856.

On the 28th January, 1857, the general assembly of the State of Iowa passed the following act:

"AN ACT supplemental to an act entitled 'An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa, by an act of Congress entitled an act making a grant of lands to the State of Iowa in alternate sections, to aid in the construction of railroads in said State,' approved May 15th, 1856, which said act of the legislature of Iowa was approved July 14th, 1856.

"SECTION 1. *Be it enacted by the general assembly of the State of Iowa*, That the said companies may make such disposition of the lands granted by the act to which this is a supplement, by mortgage or deed of trust, as may be deemed proper for the purpose of securing any amount of construction bonds necessary for the completion of such roads, which may bear such rate of interest not to exceed ten per cent. per annum, and may sell the same for the best price that can be procured. Said companies, nor either of them, shall ever be allowed to plead that such bonds are usurious or invalid: *Provided*, that the moneys realized from the sale of the bonds aforesaid shall be applied exclusively to the construction and equipment of said roads.

"SEC. 2. Any mortgage or deed of trust made upon the lands, roads, or the property of either, shall bind and be a valid lien upon all the property mentioned in such deed or mortgage, including rolling stock, and the purchaser, under a trustees' sale or foreclosure of mortgage, shall have and enjoy all the rights of a purchaser on execution sale. *Provided, further*, that nothing contained in this act shall be so construed as in any manner to interfere with, change or modify the rights of this State or of the United States to any lands granted by Congress to this State, and by this State to certain railroad companies therein, as a security for the completion of said roads, or to transfer any right in said lands otherwise than as subject to all the conditions imposed by the grant made by the United States to this State, and by the grant by this State to said companies, or by either of said grants. *And provided, further*, that the faith of the State is in no way pledged for the payment of said bonds.

"SEC. 3. Any mortgage or trust deed, made as before mentioned, shall be recorded in the office of the recorder of each county through which said road runs, or wherein it owns or holds lands, and shall be notice to all the world of the rights of all parties under the same.

"SEC. 4. This act to take effect from and after its publication in the Iowa Capital Reporter and the Iowa City Republican."

On the 14th March, 1857, said Dubuque and Pacific Railroad Company executed a mortgage to Abram S. Hewitt and others, as trustees, for the purpose of securing the payment of $12,000,000 of bonds which said company proposed to issue.

On the 9th June, 1857, said Dubuque and Pacific Railroad Com-

pany also executed to the same trustees a deed of trust purporting to confirm, in all respects, the grant made by the aforesaid mortgage.

The property intended to be embraced was described in said mortgage, and also in said deed of trust, as follows:

"All and singular the roadway, stations, depot land, and other lands appurtenant to said railroad, now owned or hereafter to be acquired by said party of the first part, constituting or belonging to the railroad of said first party, extending from the city of Dubuque, in the State of Iowa, to a point on the Missouri river, at or near Sioux City, in the said State, with a branch from the Tete des Morts to the nearest point on said road; together with all the locomotives, cars, buildings, machinery, tools, or implements whatever, belonging or appurtenant to said railroad, and all the franchises, rights, or privileges belonging to said company, or in any way pertaining or appurtenant to said railroad, now existing, or hereafter to be acquired.

"Also, all right, title, interest, claim, or demand which said party of the first part now has, or hereafter shall acquire, in or to all public lands of the United States, granted by act of Congress, approved 15th May, 1856, to the State of Iowa, and by the general assembly of said State of Iowa by act approved July 14th, 1856, granted to the said Duquque and Pacific Railroad Company, the party of the first part; subject, however, to the terms and conditions of the said acts of Congress and of the general assembly of the State of Iowa, with all the estate, right, title, and interest, property, possession, claim, or demand whatever, at law or in equity, of the said parties of the first part in and to the same, and each and every part or parcel thereof, excepting, saving, and reserving to the party of the first part all lands now owned or hereafter to be acquired by them, which may not be included in the said grant of public land from the United States, and may not be necessary for the uses and purposes of said railroad, and the depots and right of way thereof."

And said deed of trust also contained the following:

"This indenture is made for the further purpose of insuring to the party of the second part, not only all the title that said railroad company now has, but all the title which may hereafter be acquired, or which may be perfected or certified to said company.

"And said party of the first part hereby covenants and agrees to forever warrant and defend the title of said lands to the parties of the second part, their successors and assigns, against the lawful claims and demands of all persons whomsoever. Also, that the said lands are free from all incumbrance, done or suffered by the party of the first part, except the mortgage before recited, executed to the party of the second part on the 14th day of March last, for the purpose of securing the identical construction bonds herein mentioned; that said party of the first part now has all the title and right which was granted by Congress to the State of Iowa, and by said State to the party of the first part.

"And said party of the first part further covenants and represents that said party has full and ample power and lawful authority, ac-

cording to legal usage in the State of Iowa and the United States, to make, execute, and deliver this deed and said mortgage heretofore executed on the 14th day of March last, for the purpose of securing said construction bonds; and that, according to said laws and usage, all subsequent rights which may be perfected to said lands will enure, by estoppel, to the sole use and benefit of the party of the second part; that this right and lawful authority exist by express legislation as well as by usage and legal construction, as may be seen by reference to the several acts of the general assembly of the State of Iowa in this respect made and provided.

"And said party of the first part further covenants and represents, that all the laws, usages, and acts of the general assembly made and provided, or bearing any relation to this subject, shall be considered a part and parcel of this contract and deed, the same as though such laws and usages were herein set forth at large. And further, that it is a well-settled principle of law in the United States of America, and the State of Iowa, that such laws and usages do enter into and become a part of the contract, without reciting or referring to the same; and that no subsequent legislature can pass any act that will abrogate, repeal, or impair the rights of the party of the second part."

36 Subsequently, the Dubuque and Pacific Railroad Company made default in the conditions of the said mortgage, and the mortgage was foreclosed, and all the rights which the Dubuque and Pacific Railroad Company had conveyed by said mortgage were sold to and were purchased by the Dubuque and Sioux City Railroad Company. The latter named company was organized under the laws of Iowa.

Article I of its articles of incorporation was as follows:

"ARTICLE I. E. F. Bishop, Morris K. Jesup, Harman Gelpcke, John Lord, Platt Smith, Frederick Schuchardt, Thomas E. Walker, C. H. Booth, J. P. Farley, Richard Benson, W. W. Hamilton, H. L. Stout, Edward Stimson, Stephen Hempstead, Roswell B. Mason, William G. Stewart, Wilson G. Hunt, Governeur Morris, Lucius P. Starr, and John Kennedy, and their associates, and all such persons as shall hereafter become stockholders in the company hereby incorporated, form themselves into a body corporate, under the name and style of the Dubuque and Sioux City Railroad Company, for the purpose of acquiring all of the rights, privileges, property, and franchises of the Dubuque and Pacific Railroad Company, and to complete and operate said road."

The articles of incorporation of said company were filed on the 13th Augnst, 1860, in the office of the Secretary of State of Iowa.

The proceedings and sale under said foreclosure were prior to the passage by Congress of the joint resolution of 2d March, 1861. Under said proceedings and purchase the said Dubuque and Sioux City Railroad Company claim to have acquired a title to all the lands granted by Congress to Iowa by the act of 15th May, 1856, for the purpose of aiding to construct a railroad "from the city of Dubuque to a point on the Missouri river, near Sioux City;" and they claim thus to have acquired title to every alternate section of land, desig-

nated by odd numbers, lying within six miles of the line or route of the Dubuque and Pacific road as located; and, consequently, that they thus acquired title to the lands mentioned in the declaration in this suit.

The said Dubuque and Sioux City Railroad Company has conveyed to other parties portions of the said lands.

The following is a copy of one of said conveyances, embracing the lands mentioned in the declaration in this suit:

Copy of deed from Dubuque and Sioux City Railroad Company to Fritz Gelpke, Edward Stimpson, John Lord, and Shuckhurdt, and Gephardt, in Book D, Webster county (Iowa) Records, page 695, *filed for Record, June* 22*d*, 1861.

"Know all men by these presents, that the Dubuque and Sioux City Railroad Company, of the State of Iowa, for and in consideration of the sum of *twenty thousand dollars* to them in hand paid by Fritz Gelpke, and the further sum of *ten thousand dollars* paid by Edward Stimpson, and the further sum of *ten thousand dollars* paid by John Lord, and the further sum of *three thousand five hundred dollars* paid by Shuckhart and Gephart, the receipt of which several sums of money is hereby acknowledged, doth hereby grant, bargain, and sell, alien, enfeoff and convey unto the said Edward Stimpson, his heirs and assigns forever, the lands mentioned and described, as follows:

PART OF—	Section.	Town.	Range.	Acres.
All	1	88	28	790. 40
"	3	"	"	719. 04
"	5	"	"	692. 31
N. E. ¼ and E. ½	7	"	"	240
All	9	"	"	640
All except Lot 7	7	89	28	541. 43
E. ½ and N. W. ¼	9	"	"	480
All	11	"	"	640
W. ½, N. E. ¼, W. ½, W. ½, S. E. ¼, and S. E. ¼, S. E. ¼	13	"	"	520
All	15	"	"	640
S. E. ¼	17	"	"	160
All	5	88	29	733. 08
"	7	"	"	612. 48
"	1	89	"	601. 90
"	3	"	"	627. 90
"	5	"	"	611. 26
E. ½	7	"	"	320
All	9	"	"	1280
"	11	"	"	
N. E. ¼	13	"	"	
W. ½ and S. E. ¼	15	"	"	640
S. W. ¼ and E. ½	21	89	28	480
All	23	"	"	"
"	25	"	"	"
"	27	"	"	1920
"	31	"	"	657. 34

PART OF—	Section.	Town.	Range.	Acres.
All	33	"	"	
"	35	"	"	1280
N. E. ¼, and N. E. ¼	1	88	29	61. 61
Lots 1, 7, and 8	"	"	"	94. 97
S. E., S. E., W. ½, S. E. and W. ½, S. W.	1	88	29	200
All	3	"	"	727. 92
"	17	89	"	640
N. E. of N. E.	19	"	"	40
All	21	"	"	
"	23	"	"	1280
S. E. ¼ and W. ½	25	"	"	480
All	27	"	"	640
E. ½ and N. W. E. ½, S. W	29	"	"	560
All	33	"	"	1280
"	35			
				21,750. 95

"Reserving, however, to the said company, the right of way for their road across said lands, with full and free power to locate and construct the same; to have and to hold the above-granted premises to the said Edward Stimpson, his heirs and assigns, to his and their use and behoof, and to the use and behoof of the said Fritz Gelpke, John Lord, and Shuckhurt and Gephurt, and their assigns forever, in the proportion in which they have paid the purchase price of said lands above mentioned.

37 "Witness the hands of Herman Gelpke, president, and James McKinlay, secretary of the Dubuque and Sioux City Railroad Company, and the corporate seal of said company hereto affixed this eleventh day of February, A. D. 1861. And the said company doth hereby covenant to warrant and defend the said premises unto the said Edward Stimpson, and to his heirs and assigns forever, against the lawful claims of all persons whomsoever.

"HERMAN GELPKE, *President.*

"JAMES MCKINLEY, *Secretary.*

[L. S.]

"Certificate of acknowledgment before

"DAVID A. McKINLAY,

Notary Public, Dubuque."

At the date of said conveyance, no portion of the said railroad mentioned in the act of Congress of 15th May, 1856, had been completed to any point within one hundred and ten miles of any portion of the lands mentioned in said conveyance.

If, upon all the facts and circumstances, the plaintiff's title to the lands mentioned in the declaration has failed, the covenants of the defendant's deed to him are broken, and he is entitled to judgment against the defendants for $9,592, besides interest from the 9th day of November, 1858, and the costs of this suit.

If, upon the whole case, the title of the plaintiff to said lands has not failed, but, under the defendants' deed to him, and the subsequent legislation by Congress, he has acquired a good title to said lands, the defendants are entitled to judgment and to costs of suit.

This cause is submitted, without a jury, upon the foregoing agreed statement of facts; but it is expressly agreed that the matters and things herein stated are only to be taken for what they are legally worth; and that all objections on account of immateriality or irrelevancy are reserved by the parties respectively; and may be urged and considered by the parties, and by the court, upon the argument and in the decision.

Dated May , 1863.

Att'y for Plaintiffs.

Att'y for Defendants.

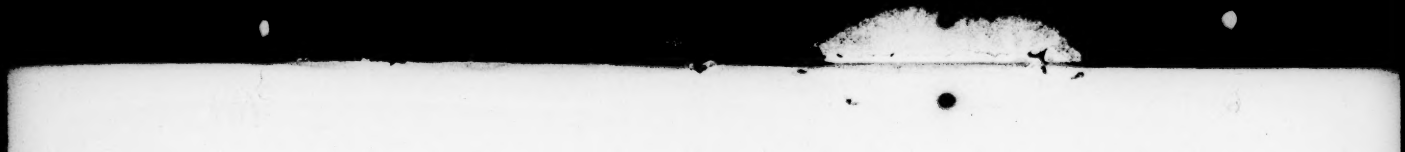
UNITED STATES OF AMERICA,
District of Iowa.

I, W. G. Woodward, clerk of the circuit court of the United States for the district of Iowa, do hereby certify that the foregoing twenty pages of print and writing are a true copy of the agreed statement of facts filed in the foregoing cause, as the same remains on file, it being all the evidence upon which the cause was submitted.

W. G. WOODWARD,
Clerk of the Circuit Court of U. S. for Iowa,
[L. S.] *with the seal of said court affixed.*

No. 113. Litchfield *v.* The Dub. & Pacif. R. R. Co. Agreed state't of facts.

Filed June 18, 1863.



Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 253.

CALVIN BURR, PLAINTIFF IN ERROR,

vs.

DES MOINES RIVER R. R. AND NAVIGATION CO.,
DEFENDANTS IN ERROR.

ARGUMENT OF PLATT SMITH WHO INTERVENES IN BEHALF OF THE DUBUQUE AND SIOUX CITY R. R. Co.

The case purports to be an action of covenant brought by Calvin Burr to recover $9,592 for breach of covenant for an alleged failure of title to about four hundred acres of land. No deed is set out and the whole case seems to be a remarkably amicable affair, and from the appearance of the record as a whole, I think it apparent that the case is not a real contest between the plaintiff and the defendant, but an attempt to obtain an abstract opinion which will virtually upset the decision of this Court in the case of Litchfield *vs.* the Dubuque and Pacific R. R. Co., reported in 23 Howard 66.,

If this case should be decided in favor of the defendant in error, on the broad merits, the plaintiff can afford to pay the cost because he will be reinstated in the land title, and the defendants will be entitled to several hundred thousand acres of land which they fancy they lost by the above quoted decision,

and the land grant Railroad Companies will lose all they gained by that case. The statements of facts in this case seem to be framed with peculiar care as to the rights of the defendants and with much looseness and negligence on the side of the plaintiff. It seems to be framed with a view to a real and earnest contest between the defendant and the railroad companies, but only a nominal contest between the parties to the record. I think they intend this case as a feeler to test the value of the resolution of Congress passed 1861, and the act of Congress passed in July, 1862, set out in the record, and dwelt upon with so much zeal in their printed arguments. If the acts should prove sufficient, then they will attack their old adversary, the railroads; if not, then they will have to apply to Congress again. Such is my theory of this case from an inspection of the record.

The brief of the plaintiff's counsel, I presume, is all that is desired by the plaintiff, but I think the scope and vigor of it not quite commensurate with the importance of the case, so far as the interest of the land-grant railroads are concerned. The learned counsel, I understand, admits the competency of the authority for the reservation which cuts so prominent a figure in the defendant's brief. This Court decided in the case reported in 23 Howard, 66, that the act of the 8th of August, 1846, did not extend above the Racoon Fork, and that all the acts of the Executive Departments were nugatory. If this is so, how can it be said that a reservation under the authority of that act is a reservation by competent authority, which will prevent the title from passing to the R. R. Company.

It appears from the agreed statement of facts that the railroad company conveyed by warranty deed about twenty-one thousand acres of these lands, including the tract in dispute, in February, 1861, a few days before the passage of the resolution of March the 2d, 1861, on which the defendant relies. The tract in dispute lies within the six mile limits of the grant, the title passed to the company by the mere location of the road; this point was so ruled in the very learned and carefully prepared opinion of Attorney General Black. (See Appendix.)

This opinion is both able and sound, and will solve several of the questions raised in this case, as to the character of title under a similar grant.

The act of Congress granting lands to Iowa differs in several particulars from the act referred in the case of Rice *vs.* Railroad Co., 1 Black. No patent is necessary under the Iowa act.

The Minnesota act expressly provided: "That the said land hereby granted shall be subject to the disposal of any legislature thereof for the purposes aforesaid, and no other; nor shall they inure to the benefit of any company heretofore constituted and organized."

Again: "That the lands hereby granted to the Territory shall be disposed of by said Territory only in the manner following, that is to say: No title shall vest in the said Territory, nor shall any patent issue for any part of the lands hereinbefore mentioned until a continuous twenty miles of said road shall be completed through the lands hereby granted."

See Rice *vs.* Railroad Co., 1 Black., 397, from which the above extracts are made.

Because the court held the above act did not vest the title in a previously organized company without building any road, and that Congress could repeal the act before any rights were vested, and only about a month after the passage of the act, therefore the plaintiff and defendant in this case hope to obtain a decision that the Dubuque and Sioux City Railroad Company has no title under the Iowa land grant.

The record in this case sets out the act of Congress and of the State of Iowa, under which the Railroad Company holds.

See Rec., p. 28, et seq.

The words "be and are hereby granted," used in the acts, show that the title in fee simple passed to the State and from the State to the Railroad Company. See Litchfield *vs.*

Dubuque and Pacific R. R. Co., 23 Howard, 66, where this court held that a grant to Iowa to improve the des Moines river passed *the fee*, though the grant only allowed the lands to be sold as the work progressed. The court say "that Congress had the undoubted right to make the grant and pass the fee."

A grant by Congress is a higher evidence of title than a patent.

Grignon *vs.* Aster, 2 How., 319.
Lessieur *vs.* Price, 12 How., 59.

The 4th section of the act of Congress instead of providing that the title shall not pass, as in the Minnesota act, expressly provides that "a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous twenty miles of each of said roads, may be sold. And when the governor of said State shall certify to the security of the interior, that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted may be sold," &c.

This language is too clear to admit of a doubt. The first installment of land not exceeding one hundred and twenty sections, can be sold to get means with which to start the road, and the second can be sold as soon as the first twenty miles are completed ; the company sold to Stimson, trustee, by warrantee deed, 21,700 acres in February 1861. The grant having been previously accepted, and about eighty miles of the road completed. But it may be said that it does not appear that the Governor ever certified to the Secretary of the Interior that any road was completed and in operation. To this it may be answered that the Company had a right to sell one hundred and twenty sections before any part of the road was completed, and the record does not show that we have sold that much. Thus stood the title when the act of March 2d, 1861 was passed, relinquishing to the State all the title which the United States still retained for the benefit of *bona fide* purchasers, under the Des Moines grant. The subsequent act passed in July, 1862, declaring that the original grant to im-

prove the Des Moines river extended to the source of the river, cannot divest the Railroad Company of their title.

That act contains an indemnity clause for those whose title may prove invalid under the original Des Moines grant.

This latter act, declaring the original grant to extend so as to cover these lands, might be looked upon as a repeal of the Railroad grant, provided that our title was in the same condition as the Minnesota grant in the case of Rice *vs.* Railroad Co., 1 Black.

But we have accepted the grant, and sold part of the lands, including the tract in dispute; and I think the court will presume, in the absence of any suggestion to the contrary, that we are carrying the mails and troops of the United States to pay for it in accordance with the terms and provisions of the act. Congress granted us the land for a consideration; this contract is a charge upon the Company that will last while the road runs. "When the King's grants are upon a valuable consideration, they shall be construed favorably to the grantee, for the honor of the King." Bacon's Abrid. Construction of Grants 5.

In the case of Rice *vs.* Railroad Co., 1 Black, 373, Judge Clifford delivering the opinion of the court, says: "If the defendants acquired such a right, title or interest in the lands under their original charter, then it is clear that it became a vested interest as soon as the act of Congress went into effect; and on that state of the case, it would be true as contended by the defendants, that the repealing act set up in the replication of the plaintiffs, is void and of no effect.

Territt *vs.* Taylor, 9 Cranch, 43.
Pawlett *vs.* Clark, 9 Cranch, 292.

And again in the same opinion.

"If the legal effect of the act, set up in the answer, was to grant to the Territory a beneficial interest in the lands, then it is equally clear that it was not competent for Congress to pass the repealing act and divest the title."

The deed of the State to the defendants was only a quit

claim, and was made two years after title to the grant passed from the State to the railroad company. That deed passed only the title which the State then had and that was nothing.

Justice Clifford, on page 374, 1 Black, says: "Grants made by a legislature are not warrantees; and the rule universally applied in determining their effect is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee." I think this clause is applicable to the governors deed as well as the two acts of Congress on which the defendants rely.

The defendants seem to think that the withdrawal from public sale under the Des Moines grant, was a reservation by competent authority, and therefore prevented the lands from passing to the State and railroad companies. Such a withdrawal is not a *reservation* of any kind, and is declared to be a void act by the decision of this court in the case of Litchfield *vs.* the Dubuque and Pacific Railroad Company, 23 Howard, 66, where all the acts of the executive department, as to these lands, were declared nugatory.

The entire grant passed to the company in fee by force of the several grants, with a limitation against selling except as the work progresses. While the contract between the Government and the company is being executed, Congress has no right to repeal it, and I contend has shown no disposition to do so. On page seventeen of the defendants brief, is the following: "Under this grant, therefore Iowa gets one hundred and twenty sections of land for each road, included within a continuous length of each of said roads, before such roads are actually completed; and afterwards it gets one hundred and twenty sections more, as often as each twenty miles of road are completed and no faster." I conceive the above to be good law as to our right to sell. But that does not prove that the whole grant did not pass with a limitation against selling except as the work progresses. The record in this case does not show that we have sold as much as one hundred and twenty sections, it shows a sale of 21,700 acres within a continuous twenty miles. The

tract in dispute is included. No other tract need be considered in this case. If the court shall decide this case in such a way as to give defendant to understand that these lands are beyond their reach for the present, it will doubtless save defendants much valuable time in experimenting in the courts and Congress.

PLATT SMITH,
For Intervenors.

APPENDIX.

CONSTRUCTION OF LAND GRANTS, ETC.

ATTORNEY GENERAL'S OFFICE,
June 7, 1856.

SIR: The act of Congress, passed February 9, 1853, gives and grants to the States of Missouri and Arkansas, certain lands for the purpose of making a railroad from the mouth of the Ohio, by way of Little Rock, to Fulton, on the Texas line, with branches. This act vests the fee simple title in the States to which the lands are given. A legislative grant by Congress does of itself, *proprio vigore*, pass to the grantee, all the estate which the United States had in the subject-matter of the grant, except what is expressly excepted. This principle has often been ruled in the courts, as you will see by reference to the following cases: United States *vs.* Perchman, 7 Peters, 51; Mitchell *vs.* United States, 9 Peters, 711; United States *vs.* Brookes, 10 Howard, 442; Lassieur *vs.* Price, 12 Howard, 59; Lediga *vs.* Rowland, 2 Howard, 581; Godfrey *vs.* Bradley, 2 McLean, 412.

The point is firmly settled, if the highest judicial authority can settle anything; and even if there had been no decision of it, I should think it too plain, on original principles, to admit of a doubt. When Congress says that a certain portion of the public domain of the United States "is hereby granted" to a State, what need can there be of any further

assurance in order to give the State a perfect title in fee? The Act of August 3d, 1854, (10 U. S. L., 346,) most manifestly does not apply in any manner whatsoever to the lands granted in 1853 to Missouri and Arkansas. The Act (the Act of 1854) prescribes the duty of the Commissioner of the General Land Office in regard to legislative grants, where the law does not convey the fee simple title, or requires patents to be issued for the lands. The Missouri and Arkansas grants are not of this kind.

The definite location of the road will locate the grant upon the proper number of even sections on each side with which the United States shall not have previously parted with the title, and the selection of the governor's agent will determine what sections are to be taken instead of those sold, or subject to pre-emption. Then the title to each particular parcel will be as complete as if it had been granted by name, number, or description.

The survey required by the first section of the law will enable you to know what lands are appropriated by the mere location of the route for the railroad, and I presume you will also be informed in some authentic way of the choice made by the Government agents. I can see no objection to your furnishing lists of those lands to any person who desires to make a proper use of them, just as you would give other information from the records of your department. But such lists can have no influence on the title of the States. The States of Missouri and Arkansas will hold these lands in trust for certain purposes. And the mode in which the trust shall be executed is prescribed in the act making the grant. What these States can rightfully do to the lands, or what remedy the United States will have if they do wrong, are not questions for you or me to decide at present.

I have the honor to be,

Very respectfully,

Your obedient servant,

J. S. BLACK.

To Hon. J. Thomson, *Secretary of the Interior.*

M'GILL & WITHEROW, PRINTERS, WASHINGTON.

Supreme Court

OF THE UNITED STATES.

No. 253.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY,
Defendants in Error,

adsm.

CALVIN BURR,
Plaintiff in Error.

ARGUMENT

On the Part of the Defendants in Error.

CHARLES MASON and
CHARLES TRACY,
Of Counsel for Defendants in Error.

NEW YORK:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU ST., COR. LIBERTY.
1863

In the Supreme Court

OF THE UNITED STATES.

THE DESMOINES NAVIGATION AND RAILROAD COMPANY,
Defendants in Error.

adsm.

CALVIN BURR,
Plaintiff in Error.

Argument for Defendants in Error.

The plaintiff in error brought his action in the Circuit Court of the United States for the District of Iowa, for the recovery of damages for a breach of covenant (*Record*, *p.* 1, 2).

The Plaintiff's petition alleged that the defendants, on the 9th day of November, 1858, by indenture, in consideration of $9,592, conveyed to the plaintiff a tract of 400 acres of land in the State of Iowa, and warranted the title against all persons whomsoever, and covenanted that the defendants then had, and the plaintiff, by means of said indenture, would receive and take a good and perfect title in fee; and the petition alleged as breach of the warranty and covenant, that the defendants then had no title to the land, and the plaintiff did not then, nor at any time afterwards, receive or take any title by means of said indenture or otherwise, and claimed damages for such breach (*Record, p.* 2, 3).

The defendant's answer alleged, first, that before, and at the making of said indenture, the defendants were seized in fee of the land, and by the indenture did convey the land to the plaintiff with a good title in fee; and secondly, that before the commencement of this suit, the defendants acquired and took a title and estate in fee to the land, which title and estate, by the common and statute laws of Iowa, forthwith enured to, and vested in the plaintiff by force of the said indenture, and that the plaintiff suffered no damages in the meantime (*Record, p.* 4).

The plaintiff's replication traversed the first defence and all the allegations of the second defence, except the statement that no damages accrued in the meantime (*Record, p.* 5).

The issue so joined was brought to trial in the Circuit Court, and was heard and determined upon the agreed state of facts set forth in the record. Judgment having gone for the defendants, the plaintiff brought the case here by writ of error.

The only questions arising on the record are questions of title. If the defendants had a good title on the 9th day of November, 1858, when they executed the indenture to the plaintiff, the action is barred; and if the defendants subsequently acquired a good title, it instantly enured to the plaintiff, and sustained the warranty and covenant, and the action is barred.

This land was conveyed to the defendants by the State of Iowa, in May 1858, in pursuance of contracts for that purpose previously made, and upon ample consideration. The State of Iowa then claimed title by virtue of the act of Congress of August 8, 1846, but the decision of this Court, in Litchfield *v.* The Dubuque, &c., Co. (23 Howard, 66), is against such claim, and we do not question that decision.

The defendants in error respectfully insist that another and perfect title in them appeared on the trial in the Court below.

First.—The act of Congress, passed August 8, 1846, granted to the Territory of Iowa for the purpose of aiding to improve the navigation of the Des Monies river, certain lands to be selected within specified limits (*Record, p.* 7).

The State of Iowa duly accepted the grant (*Record, p.* 7). The state also by its proper agents made selections of certain sections of land, as provided by the act, and the same were duly approved by the Secretary of the Treasury, and were regularly certified to the State (*Record, p.* 8, *et seq*). These acts were understood by the State, and by all parties dealing with it, and were officially held by the Attorney General and Secretary of the Interior, to have transferred the title in said lands to the State (*Record, p.* 21, 22). Of such selected and certified sections, the land now in question was a part, and the defendant's title to them was regularly derived from the State by two deeds of May 3, 1858, and May 18, 1858, given upon full consideration, of which $120,000 in cash and cash value was paid at that time by the defendants to the State, in addition to large sums previously paid and expended to and for the State by the defendants (*Record, p.* 25–27). The lands in question, however, are above the Raccoon Fork (*Record, p.* 16), and this Court having held (in 23 Howard, 66), that the grant, by the act of August 8, 1846, did not include any lands above that Fork, the defendants do not now attempt to make a title from that source.

Second.—The joint resolution of Congress passed March 2d, 1861, and the Act of Congress passed July 12th, 1862, (*Record, p.* 27.), remedied the defect in the act of August 8, 1846, and gave to the State of Iowa a perfect title to the lands in question in this suit; which title enured to the defendants.

(1.) The joint resolutions (*Record, p.* 27), provided that "all the title which the United States still retain, in the "tracts of land along the Des Moines River, and above the "mouth of the Raccoon Fork thereof, in the State of Iowa, "which have been certified to said State improperly by the "Department of the Interior, as part of the grant by Act "of Congress, approved August 8, 1846, and which is now "held by bona fide purchasers under the State of Iowa, "be, and the same is hereby relinquished to the State of "Iowa."

The act of July 12, 1862, (*Record, p.* 27), provided "that

" the grant of lands to the then territory of Iowa for the " improvement of the Des Moines River, made by the Act " of August 8, 1846, is hereby extended so as to include " the alternate sections (designated by odd numbers), lying " within five miles of said river, between the Raccoon fork " and the northern boundary of said State; such lands are " to be held and applied in accordance with the original " grant, &c."

The lands in question in this suit fall directly within the class and description here defined; and no question can arise as to the passing to the State of Iowa by these resolutions and enactment of such title as the United States then had to said lands.

(2.) The new title of the State immediately enured to the States grantee, The Desmoines &c., Co., and thence to the plaintiff, by reason of the proper effect of the several deed in fee.

The statutes of Iowa have provided for just such a case: " Where a deed purports to convey a greater interest than " the grantor was at the time possessed of, any after " accquired interest of such grantor, to the extent of that " which the deed purports to convey, enures to the benefit of the grantee." (*Record. p.* 28.)

The same rule prevails at common law.

1 *Johnson's Cases*, 81, 90, *Jackson* v. *Bull.*
12 *Johnson's Rep.*, 201, *Jackson* v. *Murray.*
15 *Howard* 525, 538 *Delauriere* v. *Emison.*

Third.—During the interval between the passage of the Act of August 8, 1846, and the transfer of a title to the State of Iowa by the joint resolution of March 2, 1861, and the Act of July 12, 1862, the title remained in the United States.

The only color for disputing this proposition, arises under the Act of Congress of May 15, 1856, by which the plaintiff contends the lands in question passed to other parties. (*Record, p.* 28, 29.)

Before considering the legal effect of that act, we ask

the attention of the Court to the following facts and circumstances which appear upon the record.

From 1848, until 1860, when this Court decided the case of *Litchfield* v. *Dubuque R. R. Company* (23 *Howard*, 66, *Record*, *p.* 27), the authorities of the General Government, and of the State, all supposed that the lands now in controversy had passed to the State, by a good title, under the Act of Congress of 8th August, 1846; and it was so held in 1859, by the District Court in Iowa, on giving the judgment in Litchfield *v.* the Dubuque R. R. Company, which was reversed by this Court in 23 Howard.

A series of official opinions and acts will be found in the record commencing with the first construction given to that act, which was by Mr. Young, Commissioner of the Law office, on the 23d of February, 1848, (*Record*, *pp.* 8–9): in which that officer held that under said grant "the State was entitled to the alternate sections within five miles of the Des Moines River, throughout the whole extent of that river, within the limits of Iowa;" and concluding with the official opinion and decision of Secretary McClellan, and of Attorney General Cushing (*Record*, *p.* 21–22.) under date of 10th November, 1856, in which these officers decided that all the lands above, as well as below, the Raccoon Fork, which had been certified and approved to the State under the Act of 8th August, 1846, had passed to the State by a good title, and that "the title of the United States had been divested" as to all of those lands. While successive officers exhibited some diversity of opinion as to the proper construction of the law, all concurred, that so far as the lands had been certified, the title of the State was perfect, and all the official acts of the department of the Interior, and of the Land Office were based upon, and affirmed the right and title of the State to the lands which had been so certified.

From 1848, until after 1860, when the decision in 23 Howard, 66, was rendered, the Land Office had reserved said lands from sale or preëmption, and held them, and marked them on its files and maps as appropriated to the special purpose of satisfying the said grant of 8th August, 1846, and as having passed to the State of Iowa under said grant. (*Record*, *p.* 22.)

Every department of the Administration of Government supposed, and acted upon the supposition, that the title to those lands already had been legally vested in the State of Iowa. While this was the universally accepted opinion, and before this Court had decided differently, Congress passed the law of May 15, 1856, granting lands to Iowa for railroad purposes, specially excepting from its operation all lands previously "reserved in any manner, by competent authority. (*Record p.* 29.)

As matter of fact and intention, it is obvious that Congress could not have intended, and did not intend, by the Act of 15th May, 1856, to grant to Iowa, for railroad purposes, lands which already had been granted and certified to the state for another purpose, under the Act of 8th August, 1846, and as to which the proper departments of the Government held that the title was fully vested in the State.

But the plaintiff contends that the Act of May 15, 1856, did operate as a legal conveyance of these lands in spite of the manifest intention of Congress to the contrary.

The record also shows that from 1854 to the present time, the State of Iowa always in fact had intended to sell and convey these lands to the defendants; that in June, 1854, for a valuable consideration, it contracted to do so; that at sundry times afterwards it conveyed portions of them in the customary way by its Land Office; and that, finally, on 3d May, 1858, and 18th May, 1858, in pursuance of a special law of the State, and for a valuable consideration, of which the sum of $120,000 was paid at the time (other large sums having been previously paid), the State, by deeds and patents in fee simple, conveyed the land to the defendants. (*Record, pp.* 22–27).

The record also shows that the State has not in any manner transferred or conveyed, or attempted to transfer or convey, said lands, nor any of them, to the Dubuque and Pacific Railroad Company, nor to any other person whatever, except to the defendants, unless it should be held that the Act of 14th July, 1856, had that effect. (*Record, pp.* 36–37).

The plaintiff contends that the State law of 14th July, 1856, conveyed title to the lands in question to the Dubuque and Pacific Railroad Company; although it is not

pretended that the Legislature intended to do any such thing; and he seeks from this Court a legal construction of the Acts of Congress, and of the State Legislature, which shall give to them a meaning wholly different from the intentions of the law-makers. (*Record, p.* 28, 2d *paragraph*).

The defendants insist that their equitable title, acquired in good faith, and for full consideration, at a time when no one doubted the perfect right of the State to sell and convey, has been converted into a perfect legal title by the Joint Resolution of 2d March, 1861, and the Act of 12th July, 1862; and that no adverse title to said lands has been acquired by any other party under the Act of 15th May 1856.

In considering this Act of May 15, 1856, the Court will notice the important reservation contained in it:

"*And provided further*, that any and all lands hereto-"fore reserved to the United States by any act of Con-"gress, or in any other manner by competent authority, for "the purpose of aiding in any objects of internal improve-"ments, or for any other purpose whatsoever, be and the "same are hereby reserved from the operation of this act, "except so far as it may be found necessary to locate the "routes of said railroads through such reserved lands, in "which case the right of way only shall be granted, sub-"ject to the approval of the President of the United "States." (*Record, p.* 29).

Under a grant containing such a reservation, we insist that the premises in question did not pass, for the following reasons:

(1.) The premises in question, before the passage of the Act of May 15, 1856, had been reserved to the United States by competent authority.

The reservation in fact was made for the purpose of aiding in internal improvements, namely, the improvement o the navigation of the Des Moines River; but the purpose is not material, for the act contemplates a reservation made for any purpose.

The premises in question, with other lands, were selected by the State of Iowa; the selection was approved by the

Secretary of the Treasury; and the Commissioner of the General Land Office proceeded to act on the selection. (*Record, pp.* 16–17, *and* 22). Afterwards, some o fthese lands were offered for sale by the United States Government. (*Record p.* 9), and then the question was again considered, and the Secretary of the Treasury sustained the right of the State. (*Record, pp.* 9–12). Thereupon, the Commissioner of the General Land Office, Mr. Young, June 1, 1849, made his order that all lands in odd numbered sections within five miles on each side of the Des Moines River, above the Raccoon Fork, be withheld from sale, and he issued a diagram, upon which the selections made by the State of Iowa, in such odd numbered sections, were colored yellow. (*Record, p.* 13). The next Commissioner of the General Land Office, Mr. Butterfield, recognized this action of the Land Office as in full force, December 19, 1849, and January 14, 1850, and March 13, 1850. (*Record, pp.* 13, 14). The Secretary of the Interior, Mr. Ewing, having, by his letter of April 6, 1850, expressed an opinion adverse to to the right of the State, under the Act of 1846, to lands above Raccoon Fork, (*Record, p.* 14–15), the opinion of the Attorney-General was taken, and the right of the State was sustained. (*Record, pp.* 15, *fol.* 27). The next Secretary of the Interior, Mr. Stuart, confirmed the right of the State. (*Record, pp.* 15–17). Under these views of the Government, the lands now in question were selected; the selection was approved by the Secretary of the Interior, and the lands were duly certified, and Attorney-General Cushing gave his sanction to the validity of such transaction. (*Record, pp.* 18, 19, 20).

The lands in question were thus reserved by the Commissioner of the General Land Office, for a purpose such as mentioned in the Act of 1856, and this reservation was expressed, established, and made a permanent record by directions to the Register and by coloring the lots on the map. (*Record, pp.* 22, 23, *and* 13).

(2.) The reservation so made had not been revoked, annulled, or modified when the Act of May 15th, 1856, was passed, but remained in full force. The saving clause in that act above quoted must have had reference to this very

state of things. The act was intended to have no operation upon lands so reserved; a reservation in fact, an actual reservation, being referred to, and the act containing no provision to annul or vacate any such reservation if erroneously or unwisely made. As Attorney-General Cushing held, such is the rule: "The general rule of law undoubtedly is, that enactments of this tenor in effect recognize the prevailing judicial and administrative construction of the previous statutes." (*Atty.-Genl. Opinions*, VII., 660.) This act, therefore, is to be understood as recognizing the existing fact of a reservation, and as carefully avoiding any conflict with such reservation.

This Act of 1856 was passed with reference to the existing state of things. The proper department had reserved certain lands, and although there was a legal error in the view then taken of the import of the Act of 1846, yet the reservation was made upon an opinion honestly formed and formally promulgated, and was for the time being, and until reversal by the department, a valid and effectual withdrawal of the lands from sale, and a reservation of them to the United States. Congress was not legislating as to what reservations had been correctly made, but was making a grant clear of all reservations which had been in fact made. It is not supposable that Congress would make a grant which should be contingent on a legal question, especially when that question would throw in doubt what lands should pass by the grant, while Congress had other lands in abundance free from such legal question which as conveniently might be granted for railroad purposes.

(3.) But this reservation by the proper public officer was a due and valid reservation, and effectually withdrew the lands from sale, and made them reserved lands within the letter and spirit of the Act of May 15, 1856.

The Act of the 15th May, 1856, gives only the qualification that the lands should be reserved by an act of Congress, "or in any other manner by competent authority." There is no specification of the official persons who shall do this thing, nor any limitation of the time or motive or purpose of their so doing; but there is a simple limitation to "competent authority." (*Record, p.* 29).

What was meant by "competent authority?" Clearly not an act of Congress; for that had been already mentioned in the alternative. It must mean some official action, without an act of Congress, and such official action as is usually had or exercised in reserving lands from sale.

The General Land Office, and the Secretary of the Interior are such competent authority. It is of the nature of the thing that the business should be done by this department of the administration of Government; and such has been and is the settled usage and practice.

The present case illustrates the mode of procedure. An order is issued to the local register, forbidding sales and entries of the lands, and a chart is issued with the reserved lots colored yellow. The General Land Office thus takes the lands out of the list of lands for entry or sale, and they are reserved to the United States. It is a separation of these lands from all others, and effectually sets them apart.

In Wilcox *v.* Jackson (13 *Peters*, 498) this court settled principles which conclusively dispose of this question.

Among other things the Court held—

1st. That an *appropriation* of land (such as severed it from the mass of the public lands) "*is nothing more nor less than setting apart the thing for some particular use.*" (Page 512.)

The Court held, therefore, that when the Secretary of War requested the Land Commissioner to reserve some land for military purposes, and the Commissioner colored the land on his map, and marked it as reserved for military purposes,—this was an *appropriation* of it to that use, which severed it from the mass of public lands, so that it could not be taken by pre-emption like other public lands.

In other words, a "reservation" and "an appropriation" of lands, seem to be convertible terms. The *effect* is to sever the lands "reserved" or "appropriated" from the mass of the public lands for all purposes. This severance remains effectual until the "reservation" ceases.

2d. That a "reservation" or "appropriation" of land, made in the manner above stated, by the Secretary and

Commissioner of the Land Office, was made "by authority of law." The court considered "the act of the War Department, in requiring this reservation to be made, as being, in legal contemplation, the act of the President, and consequently, that the reservation, thus made, was, in legal effect, a reservation made by order of the President within the terms of the act of Congress." (p. 513.)

3d. And the Court added: "But we go further, and say that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that *no subsequent law, proclamation*, or *sale* would be *construed* to embrace it, or to *operate* upon it, *although no reservation were made of it.*" (p. 513.)

As matter of fact, we have seen that this land had been "*reserved*" and "appropriated" to a special purpose by the Land Office and the Department of the Interior prior to 15th May, 1856. Consequently, within the decision above cited, the railroad grant of 15th May, 1856, "will not be construed to embrace or to operate upon" the land thus previously appropriated.

In 24 *Howard*, 394, *Clements* vs. *Warner*, the Court says: "No act of Congress has defined the meaning of the "term 'reserve,' as applied to lands, in these various acts, "nor determined explicity when these alternate sections "loose their character as reserves." They finally held that the term 'reserve,' as used in these laws, meant the temporary withdrawal of the lands from the market, made by the department to satisfy a supposed grant by Congress; which was the construction adopted in the Land Office.

It follows, from the above decision, that the lands above the Raccoon Fork, which had been withdrawn from sale and certified and approved to Iowa, prior to 15th May, 1856, were, at that time, reserved, and did not lose their character as reserved lands as long as they were withdrawn from sale by the department. Consequently, by the very words of the law of 15th May, 1856, they were excepted from its operation.

(4.) The Land Department and the Secretary of the Interior had appropriated the lands in question to another purpose, to wit, to satisfy the grant of 8th August, 1846. This they had done in the usual way, by coloring them on the maps of the office, and by selecting them, making lists of them, and approving and certifying those lists of land to Iowa, under said grant. They had separated them from the other public lands, and set them apart for this specific purpose.

Being thus appropriated, they would not have passed under the act of 15th May, 1856, even if they had not been therein specially reserved.

(5.) We do not claim that a reservation made as this was by the Department, or made even by direct enactment of the National Legislature, cannot be annulled or reversed; but we do insist that, being made by the Department, it is an act of competent authority, and stands until changed. For the time being it is an actual reservation, taking the lands out of the market, and all branches of the Government recognize it as such.

Nor is it any prejudice to the reservation, as an existing, *de facto*, and operative state of things, that it proceeded from an erroneous construction of the act of 1846. It was the business and duty of the Department, or of the Commissioner, to interpret the act for their own guidance, and they had jurisdiction to make such interpretation for the purpose of deciding whether or not to make a reservation. Although this Court can avoid their reservation, as based on an error of law, yet, until it is avoided by a superior "judicial authority," or cancelled by the department itself, it stands and is in force, It is voidable, but not void. It may be annulled, but in itself it is not a nullity. It is like a judgment rendered by competent authority, erroneous in matter of law, and liable to be reversed, but good and effectual until reversal. The decision in 23 Howard, 66, was not made until some years after the passage of the act of May 15th, 1856.

(6.) There is a series of opinions by the Attorney-General which sustain this view.

3 *Opinions Attorney-General*, 456: Mr. Grundy held that the right of pre-emption attaches only to such lands as are subject to the operation of the general land system of the country, and not to those which have been taken out of the class of public lands and appropriated to specific objects, or reserved for particular purposes.

3 *Opinions Attorney-General*, 650: Mr. Crittenden held that a reservation actually made, which erroneously included lands beyond the limits of the grant under which the reservatiod was made, was valid and effectual to prevent a sale of such lands which lay beyond the limits of the grant, until formally revoked, and notice given by the department.

3 *Opinions Attorney-General*, 274, 277: Mr. Butler held the same doctrine in an analagous case.

8 *Opinions Attorney General*, 16, where there was a contested grant, which by a decision of this Court, subsequently was adjudged to be invalid, Mr. Cushing held that a person could not enter into possession, nor claim a right of pre-emption, previous to such decision of this Court, the land being deemed reserved from sale by the grant which was finally annulled.

6 *Opinions Attorney General*, 670, (Case of the Rock Island Reservation.) This island had been reserved for military purposes. Afterwards the War Department informed the land office that it was wanted for military purposes, and requested that it might be sold; but the Land Office did not act on the request. Congress subsequently granted to a railroad company, a right to take lands for stations, &c., from the public lands. The company selected lands upon this same Rock Island. Mr. Cushing held that the reservation once made, and not annulled, still remained in force, and the grant to railroad companies did not authorize the taking of any such reserved lands.

These authorities cover a case where the act of Congress makes a grant from the public lands, without specially excepting those which have been reserved. *A fortiori* they apply with decisive force to the present case, where Congress has made exception of reserved lands.

Fourth.—The Act of May 15th, 1856, granting lands to Iowa for railroad purposes, was not an absolute grant, effectual in itself to pass the title of any lands to the State, but it was a mere conditional grant, in nature of a float, conferring on the State a right to sell a certain number of sections, and apply the proceeds in aid of those respective railroads as fast as they were built; but the title of the State would not attach to any particular land until a corresponding portion of the road was actually constructed.

No grant, whether by deed, charter, patent or statute can pass the title to lands, unless it describes them with certainty. An executory contract for land, in some cases, may be rendered available without such certainty of description; but it does not and cannot convey a title. The Act of Congress of May 15th, 1856, does not describe or define any lands with certainty, but leaves them dependent for location on the routes of railroads not yet laid; and therefore, it passes no fee or estate. But the Act of August 8th, 1846, is certain in its description, because it refers to an existing and fixed base line, namely the Des Moines River; and the additional legislation of Congress, of March 2d, 1861, and July 12th, 1862, supplies whatever else was lacking to perfect our title, the element of certainty of description being originally perfect.

(1.) The grant is of "alternate sections designated by odd numbers for six sections in width on each side of said roads." (*Record* p. 28.)

It is clear that nothing short of the construction of a railroad can determine what sections may by taken with reference to it. A prospective location of a road by drawing or prescribing a line, may or may not be followed by the building of a road upon such line or even by the building of any road at all. In order to get the benefit of this act the location of the railroad must first become permanently established, by the construction, partial or total, of the work. Congress did not intend to give lands to Iowa, or to her railroad companies, except for the purpose of aiding actual improvements; and hence the terms used require

railroads, and not surveys and plans for railroads, as the basis by which the sections are to be determined.

(2.) The designation of the termini and the general course of the railroads, in the act of Congress, does not give certainty to the route of any of them. Between such fixed termini, and within such general course, a road may and necessarily must vary from a right line often, and to a considerable extent. The grant is not based on the air line, but upon the line which the railroad track shall actually occupy. The Act of May 15th, 1856, (§ 1.) contemplates that the United States will continue to sell lands along any possible railroad route, until such route is so "definitely fixed," and provides a substitute for such as shall be sold, if the road afterwards is so built as to make the grant apply to them. (*Record p.* 28.)

(3.) The lines or routes of said railroads cannot be deemed "definitely fixed" (*Record p.* 28,) under this act, until there are railroads on the routes, partly or wholly constructed. The grant being of lands within certain distances of a railroad, the land sections cannot be ascertained until there is a railroad. When a railroad exists—wholly or partly complete—then and not before is the line or route definitely fixed. Until that stage the route or line may change. When the railroad comes into existence the route is definitely fixed. A route fixed is one that cannot be changed. Immaginary lines, resting on maps, or in resolves of directors, are changeable. They cannot be called fixed, because those who make them can change them.

In illustration of this uncertainty, it is admitted by the record (*page* 35), that not one mile of the Dubuque and Pacific Railroad was built by April 1, 1857, previous to which time the Iowa Statute, of July 14, 1856, required the lines and routes to be definitely fixed and "located upon." (*Record, p.* 30, § 6.)

(4.) The opinions of the Attorney General sustain this view.

8 *Op. Atty. Gen'l.*, 244, *Case of Iowa Railroad Grant*, Mr. Cushing held that such a grant did not attach to any particular parcel of the public lands, until the lines of the road should have been definitely fixed "upon the surface of the earth."

8 *id.*, 390. He held that the route must be "fixed without capacity of change."

(5.) The provisions of the Statute of Iowa, of July 14, 1856, in respect of the routes of these roads, do not correspond with those of the Act of Congress. The Iowa Act, after directing that certain maps and plats of the route shall be signed and filed, declares that such location, by map and chart of the line, is to be "considered final only so far as to fix the limit and boundary within which lands may be selected." (§ 6. *Record*, p. 30.) The State evidently intends to base the determination of sections, and the passing of title upon a location not "definitely fixed," not "fixed beyond the capacity of change," upon a location not fixed in fact, but only considered "final" for the purpose of getting the lands. But Congress intends only to give lands to aid railroads—to help the construction of the actual roads—and, therefore, bases the selection on locations definitely fixed, beyond capacity of change, by the work of construction itself. The Iowa Act substitutes a figurative or constructive laying of the route, to facilitate the acquisition of lands, but guards against being committed to such routes as fixed for any other purpose; so that, after the titles should be obtained, the lines of railroad may be changed at discretion.

It therefore follows, that the selection and designation of a contemplated route, provided for by the State law, does not fulfill the requirements of the Act of Congress; and nothing having been done on the railroads in question, nor in reference to fixing their routes, beyond the changeable and temporary location under the State law, the base line with reference to which the sections are to be taken has not been definitely settled, and no land has passed. The General Land Office took this view of the Act, in an official letter, set forth in the Record (p. 33).

(6.) By the Act of May 15, 1856, lands cannot be taken in anticipation of the building of a proposed railroad, but are so to be disposed of "only as the work progresses" (*Record, p.* 28, § 1, *at foot of page*); not so fast as lines are mapped out on paper; and the quantity to pass for the benefit of any road is limited.

The fourth section enacts "that the lands hereby granted "to said State, shall be disposed of by said State only in "manner following, that is to say: that a quantity of land "not exceeding one hundred and twenty sections for each "of said roads, and included within a continuous length of "twenty miles of each of said roads, may be sold; and "when the Governor of said State shall certify to the Sec- "retary of the Interior, that any twenty continuous miles "of any of said roads is completed, then another quantity "of land hereby granted, not to exceed one hundred and "twenty sections for each of said roads having twenty "continuous miles completed as aforesaid, and included "within a continuous length of twenty miles of each of "such roads, may be sold; and so from time to time, until "said roads are completed; and if any of said roads are "not completed within ten years, no further sale shall be "made, and the lands unsold shall revert to the United "States." (*Record, p.* 29).

Under this grant, therefore, Iowa gets 120 sections of land for each road, included within a continuous length of twenty miles of each of said roads, before such roads are actually completed; and afterwards, it gets 120 sections more, as often as twenty miles of road are completed, and no more and no faster. And yet the plaintiff, under the Act of 15th May, 1856, contends for a construction of that Act which would give to the State at once, in fee simple absolute, millions of acres of the public lands, on the ground that the title passed the moment the law was enacted; and, consequently (for it follows inevitably), that, by the law of Iowa, re-granting the lands to the railroad companies, the title became vested in the railroad companies at the instant of the passage of the law. That is to say, that Iowa, by an act of local legislation, had transferred to domestic railroad corporations, irrevocably, this munificent grant of millions of acres of public lands, and had vested the title to all

those lands in said corporations, by its law of 14th July, 1856, when not one mile of either of the three roads indicated by Congress, had been built, or commenced! The Department has already certified to the State of Iowa 2,540,024$\frac{4}{100}$ acres, under the Act of 15th May, 1856; and by the construction now contended for by the plaintiff, the United States might lose all the lands thus certified, as well as all others embraced within the grant, and yet not secure the completion of either railroad! This sufficiently shows the absurdity of any such construction of the law. It must be clear that the title to the granted lands (except as to the first 120 sections), cannot vest in Iowa any faster than the roads "are completed;" for such is the Act.

Nor is it possible that the lands thus given to the State, shall be anywhere, except "included within a continuous "length of twenty miles of said road." (*Record, page* 29, § 4.)

To make this view conclusive, it is only necessary to add that no portion of any of the said railroads, holding the land grant from Iowa, is now "completed" to any point within "twenty miles," or within fifty miles of the lands now in question; and it is safe to say, that on the 2d March, 1861, and 12th July, 1862, when Congress passed the acts confirming and extending the Des Moines River grant, the roads in question had not, either of them, reached within one hundred miles of the lands originally conveyed, and thus quit-claimed and confirmed under the grant of 8th August, 1846.

How, then, can it be pretended that the act of 15th May, 1856, interferes with our title to these lands?

Attorney General Cushing says, in relation to this very Act of Congress (vol. VIII. of opinions of Attorney Generals, page 244, 246): "The act contemplates that the United "States shall retain power to convey, within all the possi- "ble limits of the grant, either by ordinary sale, or on pre- "emption up to the time when the lines of road are 'defi- "'nitely fixed'; and provides for the case, by granting "contingently substituted lands beyond the original limits."

If Congress retained power to sell and convey, through the ordinary methods of the Land Office, will it be pretend-

ed that it did not possess the power to "grant" and "confirm" this land to *bona fide* purchasers, who had been unintentionally misled through the legal opinions and acts of the high executive departments of the Government?

(7.) This suit illustrates the dangerous nature of the doctrine contended for by the plaintiff.

The Record (p. 36) shows that 1,147,481 acres of land have been certified to the State of Iowa, by the Department of the Interior, to aid in the construction of a railroad from Dubuque to Sioux City, under the Act of 15th May, 1856; that the State of Iowa, on 14 July, 1856, conferred udon the Dubuque and Pacific Railroad Company the privilege of building that line of road (*Record*, p. 30); that, at that date, no part of the railroad had been constructed (*Record*, p. 35); that said Company was organized, as stated in its articles, "for the purpose of constructing a railroad from some point in the City of Dubuque thence westerly *on the best route towards the Pacific Ocean* (*Record*, p. 33); that said Company, in March and June, 1857, assumed to mortgage all the lands so granted by Congress for that route, claiming that the mortgage constituted a valid legal lien on the same (*Record*, p. 37–39); that, at that date, no part of the road was completed (*Record*, p. 36); that the Company subsequently failed, and the mortgage was foreclosed, and the right of the Dubuque and Pacific Railroad Company to said lands was sold, and was purchased by another railroad company, known as the Dubuque and Sioux City Railroad Company (*Record*, p. 39) This latter Company claim, by the purchase, to have acquired title to the aforesaid 1,147,481 acres of land, and have proceeded to sell and convey portions of the land to purchasers, including lands of the plaintiff involved in this suit (*Record*, p. 39–41.)

In order to maintain his action, the plaintiff must contend—

1st. That the title to the aforesaid 1,147,481 acres of land, by the law of Congress of 15 May, 1856, was *ipso facto* transferred to and vested in the State.

2d. That the title was thus vested *irrevocably:* for otherwise the Acts of 2 March, 1861, and 12 July, 1862, repealed the grant so far as it related to the land in question.

3d. That the State law of 14 July, 1856, *ipso facto* vested the title to all of said 1,147,481 acres of land in said Dubuque and Pacific Railroad Company; a corporation whose charter, or articles of association, compelled it to build westerly from Dubuque "*on the best line towards the Pacific Ocean,*" whether that route did or did not correspond with the route indicated by Congress.

4th. That the 1,147,481 acres of land thus became the property of the Dubuque and Pacific Railroad Company, and were lawfully mortgaged by it; and that a foreclosure of that mortgage vested a good title to the lands in the purchaser.

While the plaintiff must contend for these extraordinary propositions, the record shows, that when these proceedings by mortgage and foreclosure were taking place, the road indicated by Congress had been barely commenced, and had not reached within one hundred and ten miles of any of these lands on the 2d March, 1861 (*Record*, p. 36,); and the State law of 14 July, 1858, expressly negatives the idea of any intention to convey title to the lands by the act; for in the 12th section, it provides for issuing certificates to certain claimants of some of the lands which should entitle them to possession "*until the title shall become vested in the Company*" (*Record*, p. 32.)

(8). This Court, in a recent case, has decided that a grant precisely similar to the grant made to Iowa by the Act of 15th May, 1856, does not convey any title to the land to the State; but is a mere naked power or trust which may be revoked by Congress at its pleasure.

The acts of 2d March, 1861, and 12th July, 1862, confirming the titles derived under the Act of 8th August, 1846, were, to that extent, a repeal and revocation of any grant, or trust, or power made or conferred by the Act of 15th May, 1856

1 *Black's Rep.* 358, *Rice v. Railroad Company.* In this case the Supreme Court construed an Act of Congress, granting lands to Minnesota, and which is precisely like the Act of 15th May, 1856, granting lands to Iowa, in all its important provisions.

The Court held that—

1st. Such a grant does not convey any title, or even any beneficial interest, *in præsenti*, to the State; but

2d. It is a mere naked trust, for the benefit of the grantor, and liable to be revoked or repealed at any time before it is executed.

3d. Legislative grants, if ambiguous, are to be construed most strongly against the grantee.

4th. A grant like this is to be construed strictly against the Corporation, and in favor of the public; and nothing passes except what is given in clear and explicit terms.

We regard this case as decisive of all the main questions involved here.

(9). Legislative grants like the Act of May 15th, 1856, are quit claims only—not warranties—and convey only such title as the grantor had, and might lawfully convey at the time of making the grant. A right to convey, not existing at the time of making the grant, but acquired afterwards, does not enure to the benefit of the grantee who takes only by Legislative act, and not by deed or patent of conveyance.

23 *Howard*, 66, *Litchfield v. Dubuque &c. Co.*,
1 *Black*, 358, *Rice v. Railroad Company.*

If, therefore, it should be admitted that after the decision in 23 Howard, 66, the prior reservation was removed from these lands, such renewal would not relate back to May 15th, 1856, and therefore it would produce no effect in favor of any alleged title made under the act of that date. The

reservation being in force at the passage of the Act of May 15, 1856, the lands reserved fell within the exception and did not pass; and its subsequent removal by operation of the decision of this Court at December, Term, 1859, cannot add lands to the railroad grant.

Fifth.—If by virtue of the Act of Congress, passed May 15th, 1856, any title to the lands in question vested in the State of Iowa, then the subsequent conveyances to the defendants made by the State transferred the title to the defendants.

(1). The Act of May 15th, 1856, did not authorize the State to convey the lands themselves to the railroad companies. The aid intended by the Act to be extended to railroad enterprises was not to be furnished in lands, but in other means, namely, the proceeds of the lands when sold and conveyed to other parties. This appears throughout the Act itself (*Record*, p. 28-29), especially by section 4, which declares that the lands "shall be disposed of by the "State *only in the following manner*," and then specifies sales at certain times and in certain proportions as the "manner" intended. (*Record*, p. 29.) The Act throughout indicates the purpose of Congress, that the aid which the railroads should receive should not be by the possession of great tracts of land, but by moneys the State might pay over when it disposed of the lands; which moneys would be the ordinary and natural means for "the construction" of the railroads. Section first also provides that the lands "shall be disposed of only as the work progresses," and section fourth virtually forbids their being "disposed of" by a gross transfer of the lands themselves to any railroad companies.

Consequently the State Act of July 14th, 1856, (*Record*, p. 29-33), purporting to make transfers from the State to certain railroad companies, was not such a disposition of the lands as the Act of Congress had provided for, and could not pass any title to such railroad companies nor devest the State of the title, trust, and powers conferred on it by said Act of Congress; and the State, after the passage of said Act of July 14th, 1856, held such title, trust and

powers unimpaired and in their full original vigor. The State still held the title, and still could sell and convey.

(2). By the law of July 14th, 1856, the State of Iowa did not intend presently to convey the title of the lands itself to the railroad companies, but only to make a certain division or distribution of the benefits of the United States land grant among specific railroad companies, and to provide for future conveyances in the contingency of certain conditions being fulfilled by the respective companies, (*Vide sections* 2, 3, 4 *and* 5, *page* 30, *and section* 8, *page* 31 *of Record.*)

Whenever it is practicable, such a construction will be given to any statute that it shall not work an evident injustice. Unless compelled so to do, Courts will not construe this State Statute as granting a title to the manifest injury of the United States. "*Ea est accipienda interpretatio, quae vitio careat.*" (*Dwarris on Statutes* 689). The rights of the Supreme Government can never be taken away by doubtful words, or ambiguous expressions, but only by express terms (*id.* 706.)

The first section of this Act of July 14, 1856, accepts the grant contained in the Act of Congress of May 15, 1856, "upon the terms, conditions and restrictions contained in said Act of Congress" (*Record p.* 30.) Surely the Legislature would not in another section of the same statute attempt to violate this very pledge contained in the first section.

The fifth section itself only professes to confer upon the Dubuque and Pacific Railroad Company "so much of the "lands, interest, rights, powers and privileges as are or may "be granted or conferred, *in pursuance of the Act of Con-* "*gress aforesaid.*" (*Record p.* 30.) By its very terms therefore it excludes the construction against which we are contending.

This view of the matter is fully confirmed by the 12th section (*Record p.* 12) which provides that certain certificates therein referred to shall entitle the holders or their assignees to the possession of the land covered thereby "until the title shall be invested in the said company." This is wholly incompatible with the idea that this very

Act itself was to operate as a grant *in præsenti* of the whole of the land intended for the benefit of this road by the Act of Congress of May 15, 1856.

The purpose and object of this Act of July 14, 1856, was to designate the particular roads which were to receive the benefit of the grant from Congress. That grant had appropriated a certain amount of lands to aid in constructing a road from Dubuque to Sioux City. This land might be devoted by the Legislature of Iowa to the Dubuque and Pacific Railroad, or to any other railroad connecting those two termini. The 5th section of the Act of 14th July 1856, designated the Dubuque and Pacific Railroad, as the beneficiary of this grant; but the Company organized to construct that road were to receive the benefits conferred by the Act of Congress precisely in the manner contemplated by that act.

It is true that in giving effect to their intention the Legislature use a superfluity of words, some of which were not designed to carry an independent idea into the Statute, and are practically useless in the aggregate legislative expressions. This results from the excess of verbiage commonly found in legislation, as well as in indictments and other legal instruments, where words are multiplied in order that some may prove pertinent, applicable and effectual if others are mere surplusage. Thus the Legislature speak of "lands, interests, rights, powers and privileges;" and if any of those words are pertinent it is sufficient, although others may not be so. The fact that the word "lands" is used, when there were no lands that could be transferred, is not material. There were "interests," "rights" and "privileges," which the Legislature had the power to confer upon the Dubuque and Pacific Railroad Company in full accordance with the Act of Congress; and that is just what was done. The Legislature did not intend to convey any real estate, for that would not be in accordance with their present powers; but an "interest" in the proceeds of the lands, which from time to time should be sold pursuant to the Act of Congress, might properly be given or assured to that Company by this State enactment, and the presence of the word "lands" in the Statute, while the product of their sale was the real subject, is not to change or enlarge the sense of the enactment.

This Act also recognizes the condition belonging to the right of every railroad company to take the proposed benefits, by not granting all the lands, &c., at once, but only granting "*so much* of the lands, &c.," "*as are or may be granted and conferred in pursuance of the Act of Congress, &c.*" In other words, the railroad company shall take no faster than it fulfills the condition on which the bounty of Congress depends; and then shall take from time to time as the titles may vest in the State under the Act of Congress.

This State Act therefore amounted to a legislative promise that the benefit of the grant which was designed to aid in the construction of a Railroad from Dubuque to Sioux City should be bestowed upon the Dubuque and Pacific Railroad Company. That Company was to receive these benefits in the manner provided by the Act of Congress. The lands themselves were not intended to be conveyed, but an assurance was given that when they were sold in pursuance of the grant this Company should have the benefit of the sale.

Whether under the States power to sell these lands, a conveyance of any part of them directly to the Dubuque and Pacific Railroad Company, could be sustained, it is not necessary to inquire; for the State Law of July 14, 1856, does not purport to be such an act. It deals with the whole grant *en-masse*. It does not convey one acre unless it conveys the whole. As it could not and does not profess to convey all, it conveys none. It passes no title, but merely appropriates to a particular corporation certain proceeds thereafter to arise.

The subsequent State law of January 28th, 1857 (*Record, p.* 37), authorizing these railroad companies to issue bonds, and to mortgage, as security, their lands, roads, rolling stock, &c., including their interests arising from the Act of July 10th, 1856, does not affect the argument now presented. These companies, like all other railroad corporations, already had full power to mortgage their lands; and if they were the owners of the lands now in question, by force of the Act of July 14th, 1856, the new grant of power to mortgage them would have been superfluous. The Act of January, 1857, therefore, gave these companies permission

to mortgage, not the lands themselves, but their interest in the fund to arise from their sale, which would not have been a proper subject for mortgage without an enabling statute. The second section of this Act of January, 1857, contains this proviso: "That nothing contained in this Act "shall be so construed as in any manner to interfere with, "change, or modify the rights of this State, or of the United "States, to any lands granted by Congress to this State, "and by this State to certain railroad companies therein, "as a security for the completion of said roads, or to "transfer any right in said lands otherwise than as subject "to all the conditions imposed by the grant made by the "United States to this State, and by the grant by this "State to said companies, or by either of said grants." (*Record, p.* 37.) The Legislature thus guarded perfectly aginst any misconstruction by which the railroad companies might claim a title under this Act, and secured the position of the legal title to the land and the unimpaired power of sale, as they stood before, while giving these companies an enlarged power of mortgaging. Under such a mortgage, the mortgagees take what the company has to give, and nothing more; they are enabled to take a mortgage of what the company has, and are left to their judgment and their own risk in taking a security on so contingent and expectant a thing as the company's interest.

It should be borne in mind, that during all this time, none of the parties interested in, or dealing with the subject, had any reason to suppose that the lands now in controversy were included in the Act of Congress of May, 1856, or in either of the Acts of July, 1856, and January, 1857, for the following reasons: The Attorney-General and the Secretary of the Interior had expressed official opinions, to the contrary of such a supposition, without qualification. (*Record, pp.* 18- 19; *pp.* 20-21): These lands had been approved and certified to the State of Iowa as Desmoines River lands. (*Record p.* 22): They had been contracted by the State to the defendants, in June, 1854. (*Record p.* 22): This company, the defendants, already had done nearly or quite work enough, under this contract, to entitle them to these lands, as appears from the following facts, viz.: *First.* The company did no work after the

General Land Office refused to certify more lands. (*Record, p.* 23.) This occurred on the 21st March, 1856. (*Record, p.* 18.) *Second.* On a final settlement, in 1858, all the lands which had been certified to the State were turned over to the company, and principally in consequence of work previously done, and materials and implements furnished. (*Record, pp.* 24, 25): All that remained to be done, therefore, was to execute the conveyances, in order to complete the title in the defendants, as all the parties interested actually supposed at the time. Such conveyances actually were made in May, 1858.

(3.) If, therefore, the Act of Congress of May 15th, 1856, did vest a title to the lands in the State of Iowa, and the State did not part with such title by the State acts above mentioned; then the conveyances made by the State to the defendants in May, 1858, necessarily transferred the title to the defendants.

All that could be required to deduce a perfect title from the State to the defendants exists and appears. The State, by the supposition, having the title, and beyond controversy having the power to sell and convey, the deeds of the State to the defendants carry the fee.

(4.) It is not necessary to the validity of a conveyance by the State, of lands so held in trust for sale, that we should show an application of the proceeds to the particular purpose for which the trust was founded. It is sufficient to show, as appears in the record (*Record, p.* 25), that the defendants paid a good and ample consideration, of which $120,000 in cash and cash value was paid at the time of taking the conveyance, and the remainder had been previously paid.

Whatever may be the rule where an individual is the trustee, the person who takes a title under a sale by decree of a Court is never responsible for what the Court does with the proceeds.

2 *Sugden on Vendors*, 835, *nt.* 2.

Although in England purchasers are held liable in some cases, to see that the proceeds of trust property are applied to the specific object of the trust (*Story's Equity Jurispru-*

dence, § 1127, *et seq.*), yet in the United States the purchaser is not liable for the misapplication of funds, except in cases of fraud. (*Cruise Digest, Greenleaf's Ed., Title* 12, *c.* 4, § 36. *Story's Eq. Jur.*, § 1134. 14 *B. Monroe* (*Kerr*), 433, *Sims* v. *Linely.*)

In the present case there is no allegation or pretence of fraud. The grant was made in perfect good faith, in the supposed performance of a plain duty, and without a doubt of its propriety having been raised.

(5.) It is clear that the State had become under a legal obligation to convey the lands to the defendants, by the contracts between the State and the defendants, and the performance of such contracts by the defendants, and the payment by the defendants of sums of money; and at the same time, by the nature of the trust, the State might be bound to pay over the proceeds to the railroad companies. There is no incompatibility in the two things. The State may convey to one and pay money to the other; indeed it must do both, and it can do both.

The State having performed one of its duties, namely, to make a conveyance, it is perfectly able to perform the other, namely, to make a money payment.

(6.) The plaintiff, as an innocent third party, purchasing from the defendants, who had a good paper title from the State, is in no way liable to be affected by the disposition of the proceeds. The plaintiff *bona fide* takes a conveyance from the defendants—seeing the defendants title deeds in due form from the State and duly recorded. The plaintiff and his grantees therefore never can be disturbed by any impeachment of the prior deed to the defendants for such cause, nor be required to show the right application of proceeds by a party with whom he does not deal.

(7.) But in this instance the supposed trust was in a sovereign State, and for an object of public interest and concern. In such cases, the State having the title, the conveyance from the State carries that title, and no inquiry into the consideration received can be raised to prejudice or affect the deed.

In *Dunklin County* v. *The District Court of Dunklin*

County (23 *Missouri*, 2 *Jones*, 469), the Supreme Court of Missouri clearly recognized this rule. Lands had been granted by Congress to that State, to enable it "to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein." The State Legislature appropriated some of the lands to another purpose, and they were sold and the proceeds so applied. The question arose as to the validity of the purchasers title. The Court held that the trust in the State, created by the act of Congress, was a personal trust in the State, and was not a property trust fastening itself on the land itself and following it into the hands of others.

So in *Cooper* v. *Roberts* (18 *Howard*, 181, 182), the State of Michigan having sold school lands without any express act of Congress to authorize it, this Court said: "The trust created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the State is plenary and exclusive. In the present instance the grant is to the State directly without limitation of its powers, though there is a sacred obligation imposed on its public faith. We think it was competent to Michigan to sell the school reservation without the consent of Congress."

(8.) There is a broad distinction between an individual who is a trustee, and a sovereign State which holds that capacity. The latter is presumed to have unbounded ability to fulfill its duties to the *cestui que trust*, and is also presumed to act at all times in perfect good faith. The two elements of a trust—a power to convey, and a responsibility for the value of the thing conveyed—were in the State of Iowa. That State could exercise the power of conveyance towards one party, and perform the duty of giving the value of the land to another party, without resorting to purchase money or proceeds of the land for means of paying the *cestui que trust*. The right of the one party, is to have a fair deed of the land from the State; the right of the other party, is to have the value of the land from the State; and the State being perfectly able to render both duties, without making one dependent on the performance of the other, each party is secure and the trust cannot fail.

(9.) Thus it results that if the title vested in the State of Iowa by force of the Act of Congress of May 15, 1856, such title did not pass out of the State by force of the State statutes of July, 1856, and January, 1857, but remained in the State until May, 1858, and then passed by the State's deeds to the defendants.

Sixth.—It thus appearing from the record in this case that the plaintiff has taken, by means of his deed and warranty, the perfect title which has come to the defendants through the State of Iowa, the plaintiff has no ground to maintain his action. The judgment in favor of the defendants in the Court below should be affirmed here.

CHARLES MASON,
CHARLES TRACY,
Of Counsel for Defendants in Error.

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Supreme Court

OF THE UNITED STATES.

CALVIN BURR,

Plaintiff in Error,

AGAINST

THE DES MOINES NAVIGATION & R. R. CO.,

Defendants in Error.

Arguments on behalf of the Plaintiff in Error.

JASPER W. GILBERT, *of Counsel for the Plaintiff in Error.*

New-York:
C. S. WESTCOTT & CO., PRINTERS,
79 JOHN STREET.

1863.

903

Supreme Court of the United States.

CALVIN BURR,
Plaintiff in Error,

vs.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY,
Defendants in Error.

Arguments on behalf of the Plaintiffs in Error.

This action was brought by the plaintiff in error to recover damages for a breach of the covenant of warranty contained in a conveyance of real estate made by the defendants in error to him, and comes before this court on a writ of error to the Circuit Court for the district of Iowa. The court below gave judgment against the plaintiff in error, upon an agreed statement of facts.

The defendants in error make title under a conveyance from the State of Iowa, made in May, 1858. This conveyance was made ostensibly in furtherance of the objects of the grant to that State, contained in an act of Congress passed August 8, 1846, to aid in the improvement of the navigation of the Des Moines river. But this court has decided that the lands in question were not embraced within that grant, for the reason that it was restricted to

lands lying below the Raccoon fork, while the lands in question were situated above that place. Prior to this decision, Congress had passed an act, dated May 15, 1856, granting certain lands, and among them the lands in question, to the State of Iowa, for the purpose of aiding in the construction of certain railroads; the state had accepted the grant, and had appropriated the land by making grants thereof to the railroads.

See Record, page 28, *et seq.*

The defendants in error, however, claimed that a valid title to the lands in question became vested in the State of Iowa, by virtue of a joint resolution of Congress, passed March 2, 1861, and of an act of Congress passed July 12, 1862, both of which are set forth in the Record, page 27, notwithstanding the act of May 15, 1856, and the subsequent grants based thereupon, and that such title enured to the defendants in error. The court sustained this view of the case, and gave judgment for the defendants in error.

The plaintiff in error seeks to reverse this judgment, on the following grounds:

FIRST.—The case of Dubuque and Pacific Railroad Company *vs.* Litchfield, 23 How. 66, settles these points, viz.:

1. That the grant contained in the act of Congress of August 8, 1846, was confined to lands between the mouth of the Des Moines river and Raccoon fork, and subsequently did not embrace the premises in question.

2. That the officers of the Executive Department of the United States government had no further authority than to make partition between the State of Iowa and the United

States, and that their acts in respect to the lands lying outside of the boundaries of the grant were nugatory, insomuch that a grantee of the State of Iowa, prior to the act of 1856, of lands above the Raccoon fork, who took his title on the faith of the acts of such officers, was not entitled to protection as a bona fide purchaser.

SECOND.—The title to the lands in question passed to the State of Iowa by virtue of the act of Congress of May 15, 1856, upon trust, to apply the same in aid of the construction of certain railroads, and such title has become vested in Simpson and others, by virtue of the conveyance from the Dubuque and Sioux City Railroad Company, to the predecessor of whom the lands had been conveyed by the State, prior to the conveyance from the defendants in error to the plaintiff.

Record, pp. 28 to 41.

1. The reservation in the act of Congress of May 15, 1856, of "*lands heretofore reserved to* THE UNITED STATES," has no bearing on the case at bar. The action of the executive officers of the government relied on in the court below, conceding the authority to be "*competent*," was in no sense a "*reservation*" to the "*United States*," but, on the contrary, was taken with the purpose of producing, and if sanctioned by this court would have produced, the contrary effect; namely, to vest in the State of Iowa, instead of "*reserving to the United States*," the ownership of lands not within the boundaries of the grant contained in the act of August 8, 1846, among which were the lands in question.

2. The defendants in error have no right to draw in question the performance by the State of Iowa or its grantees of the conditions (if any), precedent or subsequent, contained in the act of Congress of May 15, 1856, or in the Legislature of the State of Iowa; for these involve matters in which the United States and the State of Iowa respectively, are the only parties interested, and which may at any time be waived by them.

THIRD.—The State of Iowa acquired no title to the lands in question by virtue of the joint resolution of Congress passed March 2, 1861, or the act of Congress of July 12, 1862, or both.

Record, p. 27.

1. The joint resolution embraces only "the title which the United States *still retain*," while, as we have seen, the title of the United States to the lands in question had been divested by the act of May 15, 1856.

2. The State of Iowa having conveyed to the railroad company, and the grantees of the latter having acquired a valid title to the lands in question, under said act of May 15, 1856, the extension of the grant in the act of August 8, 1846, provided by the act of July 12, 1862, cannot be made to operate retroactively, so as in any manner to affect the prior title thus vested under the act of May 15, 1856.

23 Howard 83.

FOURTH.—The judgment should be reversed whatever may be the views of the court on the conflicting

questions of title, for at the time, the conveyance to the plaintiff in error was made, the railroad company were in possession under color of a paramount title, and this amounted to an eviction *eo instanti*. The covenant of warranty was, therefore, broken as soon as made, for the plaintiff in error could not enter without committing a trespass, and this the law would not tolerate much less compel.

Rawl. on Cov. for title, 255.

1. The title to wild lands under a grant from Congress draws the legal possession to it, so that that the grantee is, by force of his title, in possession.

   Green *v.* Lites, 8 Cranch. 229; Bow *v.* Gratz, 4 Wheat., 215; 6 Peters, 691, 743; 10 id. 412; 11 id. 41.

2. The railroad company were in the *actual* possession when the grant to the plaintiff in error was made. They had located their road, and filed a map of the route thereof, and had completed thirty-eight miles thereof, and were in the course of constructing the residue. (Record, page 35, *et seq.*) Possession of part under a claim of title to the whole, is possession of the whole.

   Clarke's lessee *vs.* Courtney, 5 Pet., 354; Notes to Taylor *v.* Harde, 2 Smith; Leading cases, 416 d.

3. The statute of Iowa referred to in the Record, p. 28, is merely declaratory of the common law. It cannot, for obvious reasons, operate to affect the action for a breach of the covenant of warranty, when the plaintiff in such

action has been evicted, and the land is held adversely; nor can it operate in any case to transfer an after-acquired title to land held adversely, for that would be in contravention of the objects of the statutes against champerty and maintenance.

4. It does not apply to conveyances made by the State.

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